REPORTS

OF

CASES ARGUED AND DETERMINED

IN

THE SUPREME COURT

OF

THE STATE OF LOUISIANA.

WESTERN DISTRICT.
OPELOUSAS, SEPTEMBER, 1837.

MELANÇON'S HEIRS *vs.* DUHAMEL ET AL.

ON A RE-HEARING.

Where a judgment of eviction has been obtained by a third person against the vendee, it is not necessary that a writ of possession issue against him to complete the eviction. The vendee may voluntarily abandon the premises, and he is exonerated from paying the price.

So, where the vendor tenders a renunciation in due form, by the person obtaining the judgment of eviction, relinquishing all advantages under it, the vendee is not required to accept it and pay the price, if any act has been done in the mean time to invalidate the title.

This case comes up on a re-hearing. At the September term, 1834, of this court, holden at Opelousas, a judgment was rendered condemning the representative of Dr. Duhamel and his surety, to pay to the plaintiff the *price* of a tract of

WESTERN DIST. *Sept.* 1837.

MELANÇON'S HEIRS *vs.* DUHAMEL ET AL.

land, originally purchased at the probate sale of Melançon's succession by Duhamel. The latter resisted payment on the ground that he was evicted by a judgment of court, obtained by Pierre Broussard. The plaintiff, tendered an act of renunciation by Broussard, relinquishing all advantages he had obtained under said judgment, to the defendant, and still claimed the price of the land. The defendants contended, that Broussard had disposed of *all the land* he gained by the judgment, before he renounced, and consequently his renunciation went for nothing.—*See* 7 *Louisiana Reports*, 286.

Simon, for the defendants, asked for a re-hearing on the following grounds:

1. The eviction of Duhamel, had taken place long before the act of renunciation of Pierre Broussard, of the advantages of his judgment, was made, and was complete both in law and in fact.

2. The act of renunciation of Broussard, tendered by plaintiff to the defendants, does not destroy the effect of the eviction or restore the land, and is in fact no title at all.

3. The court says "the record contains no evidence of an actual dispossession or ouster of Duhamel, either forced or voluntary," and further, "had the judgment in favor of Broussard, been followed by the execution of a writ of possession, or had Duhamel voluntarily executed it by abandoning the premises, his claim against his vendor would have been perfect, and the latter could not have escaped from the consequences of the ouster of his vendee, etc."

From the mass of records and evidence introduced in this case, the court has evidently overlooked the facts which sufficiently show the eviction, and that there had been at least a *voluntary* dispossession, if not a forced one; and that this eviction had been completed, not only by the dispossession of Duhamel, but also from the acts of Broussard, subsequent to the judgment decreeing him the land, and before making the renunciation.

4. In 1824, when the mandate of the judgment of eviction was sent down to the District Court, *then* an order was entered,

that the judgment of the Supreme Court be carried into effect. Was it then necessary that a writ of possession should issue and be executed by the sheriff, if after such order of execution, Duhamel thought proper to abandon the premises, and let Broussard take possession? Was not the order to execute the judgment of this court, sufficient to authorize Duhamel to abandon the land? Was not the order an actual eviction?

5. The records of the several suits in evidence in this case, show that P. Broussard sold or transferred all the land obtained by judgment against Duhamel, to different persons, so that his renunciation afterwards, made of all the advantages he had gained by the judgment, was of no effect.

For these reasons, and in reference to the evidence in the record, a re-hearing is respectfully solicited.

A re-hearing of the case was ordered at the next term of the court, and it was reinstated on the docket.

And now at this term the case was submitted to the court, by Edward Simon, Esq., of Counsel for the defendants, on the facts and argument contained in his petition for a re-hearing.

Bullard, J., delivered the opinion of the court.

In this case a re-hearing was granted at a former term, on the suggestion of the defendants' counsel, that although the judgment in favor of Pierre Broussard, for the land in dispute, was not followed by any writ of possession, nor voluntarily executed, and while the purchaser was thereby undisturbed in his possession, may not amount to such an eviction as to entitle the defendants to a rescission of the sale upon a renunciation on the part of Broussard of the benefit of that judgment, yet that in point of fact, Broussard at the time of his renunciation had parted with his title, partly by a sale of a part of the land to Joshua Baker, and partly in consequence of his contract with Ursin Broussard, *and* that one of the plaintiffs went into possession.

The record, upon a more careful inspection of it, certainly shows, that immediately after the judgment of the Supreme Court in favor of Broussard, he did sell to J. Baker

WESTERN DIST. *Sept.* 1837.

MELANÇON'S HEIRS *vs.* DUHAMEL ET AL.

the lower arpent front of the disputed tract of land, a long time prior to his renunciation. At that time, therefore, he was not owner of the whole tract under the judgment, and consequently could not by his renunciation, convey any title to the defendants.

This tract of land purchased by Duhamel, is described as adjoining Ursin Broussard above. By a contract between Pierre and Ursin Broussard as early as 1817, it was agreed, that if the former should recover any part of the land in dispute, it should go to the latter as a part of the six arpents front, which he was to have in that provisional partition of his father's lands. On the rendition of the judgment in favor of Pierre Broussard, and as soon as the land became his by the effect of that judgment, the title immediately vested in Ursin Broussard. Accordingly, by a contract before a notary, passed subsequently to the judgment, Pierre Broussard confirms to Ursin his title to six arpents front, according to the previous act of 1817.

Where a judgment of eviction has been obtained by a third person against the vendee, it is not necessary that a writ of possession issue against him to complete the eviction. The vendee may voluntarily abandon the premises, and he is exonerated from paying the price.

From all the evidence in the record it appears, that although no writ of possession issued upon the judgment rendered by the Supreme Court, yet Duhamel's representatives abandoned the land, and entered a formal waiver of any claim for damages against his warrantors ; and that in point of fact, the land at the time the trial took place in this case, was not in possession of Duhamel, but that Leon Latiolais, the husband of one of the plaintiffs, and the brother-in-law of Ursin Broussard, was in possession at least of a part of it.

So, where the vendor tenders a renunciation in due form, by the person obtaining the judgment of eviction, relinquishing all advantages under it, the vendee is not required to accept it and pay the price, if any act has been done in the mean time to invalidate the title.

Under all the circumstances disclosed in this case, we are satisfied, that so far as Latiolais, the surety, is concerned, he is entitled to relief. He was, so far as it appears to the court, ignorant of any collusion between Duhamel and Broussard ; and, the renunciation of Pierre Broussard at a time when his counsel alone was not sufficient to destroy the rights of others under that judgment, ought not to be considered as placing the parties in the same situation they were in before the eviction.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

LEFEBVRE *vs.* COMEAU ET AL.

APPEAL FROM THE COURT OF THE FIFTH JUDICIAL DISTRICT, FOR THE PARISH OF LAFAYETTE, THE JUDGE OF THE SIXTH DISTRICT PRESIDING.

The sale of a tract of land by the register and receiver, under the act of 1814, granting pre-emption rights to actual settlers, even without a patent, is evidence of title *out of the government*, and the purchaser will hold against one who buys subsequently.

This is an action to prevent encroachment and disturbance, and to be quieted in the possession and ownership of a tract of land, situated in the parish of Lafayette, at a place called *Côte Gelée.*

The plaintiff alleges, that he purchased a tract of land, containing six hundred and eighteen acres, from the government of the United States, by right of settlement, as far back as 1818; that he had it located and surveyed, and on the 15th June, 1829, obtained the final certificate from the register. He further shows, that the defendants have entered upon, and set up claim to about two hundred and ten acres of his said tract, without any title or right to the same, and that they are trespassers. He prays that said defendants be enjoined and inhibited from further disturbing him in the quiet possession and enjoyment of his entire tract.

The defendant avers, that he is the proprietor of four hundred and eighty-five acres of land, in virtue of a settlement made prior to 1803, and that said settlement and cultivation gave him an equitable right to have his imperfect title confirmed, and which was confirmed by an act of Congress, passed the 29th April, 1816; that he has been in the possession of said land ever since the original settlement, and claims to hold by the prescription of twenty or thirty years in addition to his good title.

Upon these pleadings and issues the case was tried.

The plaintiff produced in evidence the register's certificate, dated the 21st November, 1818, that he had paid the price

WESTERN DIST. *Sept.* 1837.

LEFEBVRE vs. COMEAU ET AL.

of two dollars per acre to the government, for the land claimed by him; and also a plat of survey, approved by the United States Surveyor General.

The defendant claimed under a commissioner's certificate, recommending the confirmation of his tract of land, which was confirmed by act of Congress, on the 29th April, 1816. It was not located and surveyed until 1829.

The testimony showed, that Comeau obtained permission from plaintiff to enclose a field on this land, in 1829, which he cultivated for that year only.

The plat of survey showed, that the defendants had interfered and entered upon two hundred and ten acres of the plaintiff's land, as located and claimed by him under his purchase from the United States government.

There was judgment for the defendant, and the plaintiff appealed.

Simon, for the plaintiff, showed, that in 1818, he purchased the land he claims, from the government of the United States, and had it located in 1819. This location being approved by the surveyor general, and made anterior to that of the defendant, it should be maintained.

2. The defendant's location is too vague to be admitted. From the evidence it will be seen, that that portion occupied and cultivated, and on which he founds his claim, is entirely out of the four quarters of sections purchased by the plaintiff; and that it was not until lately he was permitted to cultivate a field on plaintiff's land. The principle settled in the case of *Rachel et al.* vs. *Irwin*, is applicable to this. *See* 8 *Martin's Reports, N. S.* 332.

3. The United States sold the land in question to the plaintiff, and received the price. It could not sell the same land afterwards to the defendant, who had no previous claim to it, either by settlement, location, survey or otherwise.

Bullard, J., delivered the opinion of the court.

This is a petitory action, in which the plaintiff sets up title to a tract of land, in the parish of Lafayette, described to be

the north-east and north-west quarters of section thirty-four, and the south-east and south-west quarters of section twenty-seven, in township 10 south, range 5 east. He asserts title to the same, under a purchase from the United States, in pursuance of the act of Congress of 1814, granting pre-emption rights to actual settlers.

The defendant denies the right of the plaintiff, and sets up a right to four hundred and eighty-five acres, and sixty-six hundredths of the same land, in virtue of his settlement and cultivation, prior to the year 1803, and a confirmation of his claim by act of Congress in 1816. He also pleads prescription.

The documentary evidence in the cause, shows, that on the 20th November, 1818, the plaintiff purchased the land described in his petition, of the proper land agents of the United States at Opelousas, in virtue of his right of pre-emption; and that in pursuance of the acts of Congress, then in force, he paid at the time of his purchase, a part of the price, and the balance was paid, and a final patent certificate granted on the 15th of June, 1829.

The sale of a tract of land by the register and receiver, under the act of 1814, granting pre-emption rights to actual settlers, even without a patent, is evidence of title, *out of the government*, and the purchaser will hold against one who buys subsequently.

This court has uniformly held, that such a sale even without a patent, is evidence of title out of the government. The government is completely divested by such a sale, made in pursuance of an act of Congress, conferring authority on the register and receiver. The land was specifically described by the numbers of range, township and section, according to the general system of the public surveys. Unless, therefore, it should appear that the defendants, or those under whom they hold, were at the date of the plaintiff's purchase, owners of the land by an anterior title, or that they have acquired a better right by prescription, it seems to us clear that the plaintiff must recover.

The claim of J. B. Comeau, before the land commissioners, (and which forms the basis of his title) is described to be for four hundred and eighty-five acres and sixty hundredths, in the priarie of Côte Gelée, by settlement. The evidence in support of it appearing contradictory, it was merely recommended for confirmation. By an act of Congress in

WESTERN DIST. *Sept.* 1837.

THOMPSON *vs.* THOMPSON'S HEIRS.

1816, the report was adopted and the claim confirmed. It was not until 1830, that the claim was surveyed and located under the authority of the United States, in such a manner as to conflict with the claims of the plaintiff, and to cover part of the land previously purchased by him.

This claim is extremely vague as to its calls; nor is there any evidence in the record which satisfies us that any part of the settlement made by Comeau, before the change of government, was upon either of the quarter sections which the plaintiff had a right to purchase, and which he did purchase in 1818. That the defendant was entitled to the quantity of land claimed by and confirmed to him, we do not doubt, but it does not follow that the surveying department could locate it in such a manner as to deprive the plaintiff of any part of his purchase. By its terms the defendant's title does not necessarily embrace any part of the plaintiff's land, and we are not prepared to admit the authority of the government itself, to take what they had already sold.

The evidence of possession, is, in our opinion, insufficient to establish prescription.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be reversed and annulled, and it is further adjudged and decreed, that the plaintiff do recover and be quieted in his title to the tract of land described in his petition, and that the defendants pay the costs of both courts.

THOMPSON *vs.* THOMPSON'S HEIRS.

APPEAL FROM THE COURT OF THE FIFTH JUDICIAL DISTRICT, FOR THE PARISH OF ST. LANDRY, THE JUDGE THEREOF PRESIDING.

Under the plea of payment, where proof of actual payment of *a part* of the debt is shown, and presumptive evidence that *all has been paid*, is offered, it must be conclusive, even after the lapse of many years, or it will be disallowed.

Actions on *hypothecary debts*, or for the *price* of *slaves*, evidenced by authentic acts according to the Spanish law, are only prescribed after the lapse of thirty years, from the time the *price* or *debt* is due.

This is an action on a notarial act, executed the 21st August, 1815, by the attorney in fact of the plaintiff, to Sydalise Thompson, in which he sells and conveys to her a slave woman, named Becky, and her two infant children, named William and Louise, for the sum of one thousand dollars. The act was made single and signed by the plaintiff's attorney *alone*, before the notary and two witnesses.

On the 18th May, 1818, John Thompson executed before a notary, a confirmatory act of said sale, accepting and approving it on the part of his wife; and on the 10th of November, 1831, this suit was instituted against the widow and heirs of John Thompson, for the *price* of said slaves, as specified in said act, without alleging a privilege or mortgage on the *things* sold, but simply praying judgment for the *price* and legal interest thereon.

The defendants pleaded the general issue; denied specially that they were indebted to the plaintiff; that if they ever were indebted in the obligation sued on, it had been long since paid. They further pleaded prescription. and that the action was barred by lapse of time.

Upon these pleadings and issues, the cause was tried before the court.

The evidence showed, that when this sale was executed, Madame Thompson's husband was living, and attended to all the payments; that the plaintiff was a relation, and in 1814 obtained a commission in the marine service, and the next year when leaving Louisiana, he made the sale of the slaves in question, who were then mortgaged for a debt which had to be paid off by Mrs. Thompson and her husband, before getting possession.

G. Chretien, witness for plaintiff, says, he made the sale as attorney for G. Thompson; that at the time there existed a mortgage on the slaves, (Beckey and her children, William and Louise) in favor of Gradnigo, and they were in his

WESTERN DIST. *Sept.* 1837.

THOMPSON *vs.* THOMPSON'S HEIRS.

possession; that he paid, at the instance of Thompson, about two hundred and forty dollars principal, and some interest or costs; that he has since been reimbursed by Thompson the sum he paid, which was, as well as he recollects, about three hundred dollars.

In addition to this, it was in proof, J. Thompson paid off a note of plaintiff's to J. H. Thompson, for three hundred and fifteen dollars; and also one hundred and thirty-one dollars in satisfaction of a judgment for balance of price (and the costs) of the slave Becky, due by plaintiff since 1810; payment of fees to W. L. Brent, Esq., for defending these slaves against the creditors of G. Thompson, was shown to the amount of seventy-five dollars; aggregate of actual payments proved, eight hundred and twenty-one dollars.

Presumption of complete payment was made, as resulting from the testimony of the following witnesses.

C. Adams, witness for plaintiff, was asked the following interrogatory: "Did or did not Gillis Thompson, the plaintiff, propose through you as agent or friend, after his return from the marine service, to J. Thompson or his wife, (now defendant) that if they would let him have Becky's two children, (William and Louise) he would give them two other likely young negroes of equal value? Did you not make the proposition accordingly? If you please, state the particulars of it, and also the answers of J. Thompson and wife thereto."

Witness answers: "*Yea;* I cannot state the time G. Thompson, the plaintiff, *authorised me to make the offer*, but John Thompson *agreed to take it.*"

Brent says, on being asked if he had not heard the plaintiff say he was willing to buy them, or to give their full value in other negroes for the *two children* of Becky; that the impression is on his mind that he did, but is not positive.

G. Chretien, who sold the slaves for plaintiff, states further, that Mr. J. Thompson had paid, not only the amount of the purchase money of Becky and her two children, but *beyond* that sum, because when Gillis Thompson went away, he was very much indebted; that several judgments existed against

him, and to have the free possession of said slaves, J. Thompson had been obliged to pay them over. Witness says, that J. Thompson had also some law-suits for that object."

Witness further states, that "he thinks the price for which the said slaves were sold, was the worth of them."

Records of suits and other evidence was produced, showing the embarrassments and insolvency of the plaintiff at the time of sale, as tending to raise the prescription of full payment; especially as connected with his silence for so long a time before a demand of payment.

The district judge was of opinion, that the defendants had satisfactorily shown, that the whole price of the negroes sued for, had been paid long before the institution of suit. Judgment was given for the defendants, from which the plaintiff appealed.

Bowen, for the plaintiff, urged the reversal of the judgment. He contended, that the evidence relied on to raise the prescription of payment, was insufficient. Most of it was derived from the declarations of the defendant's husband, which were not legal proof. Some of the payments proved, should be allowed, but there was a balance due.

2. The plea of prescription should be overruled. This is an hypothecary action on a notarial act, which, by the laws in force at the time, is not prescribed until the lapse of thirty years. The case of *Goddard's heirs against Urquhart*, does not apply to this.

Lewis, for defendant, showed, that from the evidence of the plaintiff's embarrassments and indebtedness, when he left the state in 1815, at the time of this sale, that there was strong presumptive proof of complete payment of this demand, long before the suit. His silence for seventeen years, when in needy circumstances, and his proposal to exchange other negroes for the one he sold, without ever demanding the price, is also evidence that he considered the whole demand paid. There is proof of actual payment for a considerable amount.

WESTERN DIST. *Sept.* 1837.

THOMPSON *vs.* THOMPSON'S HEIRS.

2. This is a personal action. It is a simple demand for the *price* of certain slaves, without any claim of mortgage or privilege. Personal actions are, and were prescribed, even before the Louisiana Code, by *ten* years. See case of *Goddard's heirs* vs. *Urquhart.* 6 *Louisiana Reports*, 649.

Carleton, J., delivered the opinion of the court.

This action is brought for the recovery of the sum of one thousand dollars, the price of three slaves, sold by the plaintiff to the defendants, on the 21st August, 1815.

The defendants' answer by denying generally, plead payment, and the prescription of five and ten years.

The cause was submitted to the court who gave judgment for the defendants; the plaintiff appealed.

Under the plea of payment, where proof of actual payment of *a part* of the debt is shown, and presumptive evidence that *all has been paid*, must be conclusive, even after the lapse of many years, or it will be disallowed.

We have carefully examined the testimony in the record, and think the court erred in coming to the conclusion, that the entire sum claimed by the petitioner had been paid. We think, on the contrary, it clearly appears from the evidence, there is still a balance of two hundred and fourteen dollars due him.

Actions on *hypothecary debts*, or for the *price* of slaves, evidenced by authentic acts, according to the Spanish law, are only prescribed after the lapse of thirty years, from the time the *price* or *debt* is due.

But defendants' counsel contends, that the plaintiff's claim is barred by the prescription of five and ten years. We think differently. This is an hypothecary debt; and by the laws of Toro, promulgated in 1505, which must be our guide on this point, such actions are not prescribed under thirty years.

The 63rd law declares, "El derecho de executor por obligacion personal se prescriba por diez anos; y la accion personal y la executoria dada sobre ella sa prescriba por viente anos, y no menos; pero donde en la obligation hay hipoteca, o donde la obligation es mixta, personal y real, la deuda se prescriba por triente anos, y no menos; lo qual se guorde sin embargo de la ley del Rey Don Alonzo uestro progenitor, que puso, que la accion personal se prescribiere pour diez anos." (ley 6, tit. 15. lib. 4 R.) 3 nov. Rec. lib. 10, tit. 8, ley 5 p. 196. See also the case of *Xanpi* vs. *Orso*, 11 *Louisiana Reports*, 57.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be avoided and reversed; that the plaintiff have judgment for the sum of two hundred and fourteen dollars, with interest from the 16th of May, 1816, until paid, with costs in both courts.

PARMLEE & BAKER *vs.* BRASHEAR.

APPEAL FROM THE COURT OF THE FIFTH JUDICIAL DISTRICT, THE JUDGE OF THE SEVENTH PRESIDING.

When a curator's bond is forfeited by a failure to comply with its conditions, and such failure and breach of the condition of the bond are alleged, a right of action accrues against the surety, which authorizes the party injured to maintain suit on the bond in the courts of general jurisdiction.

So, where a tableau of distribution has been filed, and the curator authorized and directed to pay accordingly, if he neglects to pay when thus legally required, the creditor has at once his remedy on the bond.

This is an action on a curator's bond against the surety therein. The plaintiffs allege, that the estate of Robert S. Barr, deceased, in the Parish of St. Mary, is indebted to them in the sum of three hundred and sixty-seven dollars, with interest. That R. S. Brashear was duly appointed curator of said estate, with the defendant, Walter Brashear, his surety, in the bond.

He further alleges that the said curator had obtained a prolongation of his term, and renewed his bond; but that he has failed to pay said claims, although requested to do so, and when there were ample funds in his hands to pay the debts of the estate. He alleges, that the surety bond has become forfeited by reason of the illegal and unfaithful admi-

WESTERN DIST. *Sept.* 1837.

PARMLEE AND BAKER *vs.* BRASHEAR.

nistration of said testate, and that the surety is liable for the debts thereof. Wherefore he prays for judgment against him. The defendant pleaded that this action was premature, because the curator of W. S. Barr, deceased, had not filed a definitive tableau or settlement of the estate; that it must be definitively settled contradictorily with the curator, in order to ascertain its situation. A liquidation of the estate should have been provoked in the Court of Probates, before suing on the bond. In his answer he pleaded a general denial, and states, that the funds of the estate are amply sufficient to pay the creditors thereof; that the curator has not been guilty of mal-administration as alleged. He prays that this suit be dismissed.

The case was tried on these pleadings and issues.

The conditions of the curator's bond, sued on, were, that "he should well and truly administer upon the estate of W. S. Barr, deceased, and faithfully execute and perform the duties required of him by law, as curator, and shall account for, and pay over to the heirs, etc. of W. S. Barr, deceased, or to such *person or persons that shall be entitled to the same when thereto legally required*, all such sums of money as shall come into his hands as curator aforesaid; then the above obligation to be void, etc."

The plaintiffs previously obtained a judgment in the Probate Court, liquidating their debt, and which was afterwards placed on two tableaus, filed by the curator. His term had been prolonged twice. The present suit was instituted on the 14th of September, 1835.

The district judge was of opinion, that the suit was premature, and that the plaintiff should have pursued the estate by a different process. There was judgment for the defendant, and the plaintiff appealed.

Splane, for the plaintiffs.

Simon, contra.

Bullard, J., delivered the opinion of the court.

This is an action against the surety, on the bond of the curator of a vacant estate, in which the plaintiffs ask to

recover the amount of their claim against the estate, on the allegation, that the curator had administered the estate in an illegal manner, and had never paid over to the petitioners the amount of this demand, though ordered to do so by a judgment of the Court of Probates, and that the curator had collected and converted to his use, the monies of the estate, which, he alleges, is perfectly solvent.

The defendant, by way of exception, alleges, that the plaintiffs cannot maintain the present action, because they cannot have any recourse against him as the surety of the curator, until the estate is finally settled, and a definitive tableau of distribution filed. That the plaintiffs have no right of action, until the estate be settled contradictorily with the curator in order to ascertain the situation of the same, and that it was the duty of the plaintiffs, before bringing their action, to cause a liquidation of the estate to be made before the Court of Probates, as the District Court has no power to order one. He further denies the allegations in the petition, and that the estate is fully sufficient to pay the debts, and that the curator has not been mal-administered.

This exception was sustained, it being the opinion of the district judge the suit was premature, and that the plaintiff was bound to pursue the estate by a different process.

When a curator's bond is forfeited by a failure to comply with its conditions, and such failure and breach of the condition of the bond are alleged, a right of action accrues against the surety, which authorizes the party injured to maintain suit on the bond in the courts of general jurisdiction.

The only question, therefore, which this case presents, is, whether this dilatory exception ought to have been sustained. This question involves the inquiry, whether a breach of the conditions of the bond has been properly assigned; for, it will be admitted on all hands, that if the bond has been forfeited by a failure to comply with its conditions, and such failure is alleged in this case, a right of action against the surety has accrued, and the plaintiff is not bound to pursue his remedy by any circuity of action.

The conditions of the bond were, that the curator should well and truly administer, and execute, and perform the duties required of him by law, as curator, and that he should account for and pay over to the heirs, or their legal representatives, or to such persons as shall be entitled to the same

WESTERN DIST. *Sept.* 1837.

PARMLEE AND BAKER *vs.* BRASHEAR.

when thereto legally required, all such sums of money as shall come into his hands as curator.

The breach of these conditions is alledged to be, that although the plaintiffs had a judgment, and the order of the Probate Court for the payment of their claim for three hundred and sixty-seven dollars; and although he had sufficient funds in his hands for the payment of the same, yet he has never paid their claim, but has converted the money to his own use.

We are, by no means, prepared to assent to the broad proposition asserted in the defendant's exception, that no recourse can be had against him upon the bond, until the estate is definitively settled by filing a final tableau of distribution, and liquidated contradictorily with the curator, in the Probate Court. Cases may be supposed, in which the curator, after getting the estate in his hands, wholly neglects to pursue the steps required by law for his administration, or absconds with the proceeds of the estate. It might be wholly impossible for a creditor to proceed contradictorily with him in the liquidation of the estate—*nemo precisé cogitar ad factum.* It was for the purpose of giving to parties interested other means of securing and enforcing their rights, that bonds with sureties are required in the administration of estates. After a tableau of distribution has been filed, and the curator has been authorized and directed to pay accordingly, if he neglects to pay, when thus legally required, it appears to us that the creditor has at once his remedy upon the bond.

So where a tableau of distribution has been filed, and the curator authorized and directed to pay accordingly, if he neglects to pay when thus legally required, the creditor has at once, his remedy on the bond.

In the case before the court, the plaintiff exhibits a judgment against the estate, liquidating their claim, and two tableaus of distribution, presented by the curator himself, in which the plaintiffs are represented as creditors of the estate, with orders of the Court of Probates for the payment accordingly, and yet, it is alleged, that he has not paid.

Assuming, therefore, as true, what is alleged in the plaintiffs' petition, we think they have averred a breach of the conditions of the bond, which entitles their recourse upon it, against the surety, in courts of ordinary jurisdiction, and that the exception ought not to have been sustained. But as the

court below does not appear to have tried the case upon its merits, and to have inquired into the amount to which the plaintiffs might be entitled, it being admitted that a small part was paid, the case must be remanded.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be reversed; that the exception be overruled, and the case remanded to the District Court for further proceedings, according to law, the appellant paying the costs of the appeal.

M'BURNEY *vs.* FLAGG.

APPEAL FROM THE COURT OF THE FIFTH JUDICIAL DISTRICT FOR THE PARISH OF ST. MARY, THE JUDGE THEREOF PRESIDING.

Where A conveys to B certain slaves in South Carolina, conditioned that they shall be delivered up at the end of two years *if required;* or that in the mean time they might become the absolute property of B, on his paying the price stipulated: *Held*, that this is not a sale so as to vest the property in B, and make it liable while in his possession and after removal to this State, for his debts.

This suit was commenced by an opposition of the plaintiff to an order of seizure and sale, obtained by the defendant, against certain slaves in the possession of Wm. Youngblood.

The plaintiff alleges, she is the owner of said slaves. That Youngblood has been for a long time in embarrassed circumstances; that she is the aunt of his children, and being desirous of assisting them in their education and support, conveyed the said slaves to their father, with the view of effecting these objects, and on the sole and only conditions, that the said negro slaves and their issue should be considered her property, and not liable to any of Youngblood's contracts;

WESTERN DIST. *Sept.* 1837.

M'BURNEY *vs.* FLAGG.

but that he might have them when he paid her the sum of two thousand three hundred and sixty-four dollars. This payment was never made.

The defendant pleaded a general denial, and averred, that Youngblood had been in the possession of said slaves for a long time; and if the plaintiff ever had title, it has been lost by prescription. That she suffered Youngblood to bring the slaves into this State, as his own property, to obtain a false credit thereon and to defraud his creditors, and that she has participated in the fraud, and lost any title she may have had thereby. He prays that her demand be rejected.

The cause was tried on these pleadings and issues.

It appeared that on the 3d June, 1829, when Youngblood was on the eve of leaving South Carolina, the plaintiff, in writing, made the conditional sale to him, which she sets up, of the slaves in question.

In 1832, Youngblood mortgaged these slaves with others to the defendant, to secure a debt of eight or nine hundred dollars. The defendant had obtained an order of seizure and sale, and was proceeding to sell them when the plaintiff made her opposition. She had judgment, and the defendant appealed.

Lewis and *Bowen*, for plaintiff.

1. The agreement between plaintiff and William Youngblood, if a sale at all is with a suspensive condition.—*Louisiana Code*, 2016, 2033, 2036, 2038. 6 *Toullier*, 507, *n.* 472. *n.* 475, *and no.* 475, *and note* (1) *p.* 529, *n.* 501.

2. The title to the slaves *remained vested in plaintiff*, and could not be divested, but by payment of the price agreed upon. *Louisiana Code*, 2038, 1446. 6 *Toullier*, 560, *n.* 526. *p.* 508, *n.* 473. *p.* 229, *n.* 501, *and note* (1.)

3. General W. Youngblood, had no title to the slaves, and could not sell or mortgage them to defendant, Flagg. *Louisiana Code*, 3267, 3268, 3271. 4 *Martin, N. S.* 371–2.

4. No law of this state requires the registry of such an act, as the one sued upon.

5. Flagg is *assign* (*ayant cause*) of General W. Youngblood, and as such, cannot plead the want of registry, even in cases where it *is* required. *Louisiana Code*, 3522, *n.* 5. 2239 and 2417.

6. W. Youngblood could confer no greater right on the slaves, to Flagg, than he had himself. 7 *Toullier*, 32, *n.* 31.

Carleton, J., delivered the opinion of the Court.

It appears that William Youngblood, was indebted to the defendant in a sum of money, to secure the payment of which, he mortgaged certain slaves by public act, on the 10th July, 1830, before the parish judge of St. Mary. The money not having been paid, the defendant obtained thereon an order of seizure and sale, whereupon the plaintiff instituted this suit, and claimed the slaves as her property.

The defendant answers by general denial, and opposes the plea of prescription in support of Youngblood's title, and further avers, that the petitioner suffered him to introduce the slaves into the country, and thereby enabled him to obtain credit in defraud of third persons, by reason of which, the property became liable for his debts.

The cause was submitted to the court, which set aside the order of seizure and sale, and decreed the slaves to be the property of the petitioner. The defendant appealed.

At the trial of the cause, the following document was introduced in evidence, by the plaintiff, relied on by defendant as Youngblood's title to the slaves, and the basis of the mortgage.

"Memorandum of an agreement entered into this 3d day of July, 1829, between William Youngblood, of the one part, and Mrs. Eliza M'Burney, of the other part. Whereas, the said Eliza M'Burney, legally possessed in her own right of six negro slaves, named Sam, Cudjoe, Dick, Abram, Cupid, Trace and Peas, is willing to dispose of some of the said slaves to William Youngblood, upon a credit, provided she can be indemnified and secured in the ultimate payment therefor; and whereas, said William Youngblood is willing, at an extended credit, to pay for the said negroes, the sum of

WESTERN DIST. *Sept.* 1837.

M'BURNEY *vs.* FLAGG.

two thousand three hundred and sixty-four dollars and eleven cents. Now, know all men by these presents, that I, the said Eliza M'Burney, in consideration of the sum of one dollar, to me in hand paid, do agree to permit the said Wm. Youngblood, to take into his possession the said negro slaves, and to remove the same from this state, upon these sole and only considerations. That the said slaves, with the issue of the females, shall be considered my property, not liable to any contracts of said William Youngblood, until the payment of the said sum of two thousand three hundred and sixty-four dollars, together with the interest that shall have accrued on the same, at the time of the payment of the principal; and I, the said Wm. Youngblood, in consideration of the premises, do hereby acknowledge myself to have received said negroes, and upon the conditions above specified, and none other; do acknowledge myself to have received the said negroes, as the property of said Eliza M'Burney, to be considered hers, with the issue of the females as aforesaid, until the full payment of the said sum of two thousand three hundred and sixty-four dollars and eleven cents, with interest as aforesaid; and I, the said William Youngblood, do bind myself to deliver up the said negroes to the said Eliza M'Burney, whenever she shall demand the same, after the expiration of two years, if payment in full is not then made; and moreover, do bind my heirs, executors and administrators, to deliver the same at my decease, if the said sum of money is not then paid, an allowance being made for what may have been paid on that account: in witness whereof, we have hereunto set our hands and seals at Walluoni, in the State of South Carolina, the day and year first above written.

(Signed) "W. YOUNGBLOOD,
"ELIZA W. M'BURNEY."

Signed and Sealed
in the presence of
D. C. CAMPBELL.

The points raised in controversy have been fully argued by counsel, and sustained by a number of authorities; never-

theless we do not think the case presents any question of difficult solution.

The parties expressly stipulate, that the property in the slaves, shall abide in the plaintiff; that Youngblood should not become owner of them, nor they be liable to his contracts, until he should have paid the sum agreed on.

The contract wants some of the essential requisites of a sale; for the plaintiff has no absolute right to demand the price, and Youngblood might at any time he thought proper, have returned the slaves, after enjoying their services gratuitously. Had he sold them, under such a title, the transfer would have certainly been void, and therefore the mortgage which may result in an alienation, must necessarily share the same fate. No illustration can make the subject plainer than the parties themselves have made it.

We, therefore, think there is no error in the decree of the District Court.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

When A conveys to B certain slaves in South Carolina, conditioned that they shall be delivered up at the end of two years *if required*; or that in the mean time they might become the absolute property of B, on his paying the price stipulated: *Held*, that this is not a sale so as to vest the property in B, and make it liable while in his possession, and after removal to this State, for his debts.

YOUNGBLOOD ET AL *vs.* FLAGG.

APPEAL FROM THE COURT OF THE FIFTH JUDICIAL DISTRICT, FOR THE PARISH OF ST. MARY, THE JUDGE OF THE DISTRICT PRESIDING.

In a marriage settlement made in South Carolina, to which the future husband, and intended wife, were parties, certain slaves were given in *trust* by her father, for the *use* of the wife, and at her death to go to her children, and this act was never recorded in South Carolina, so as to have effect against the creditors of the husband: *Held*, that as there were no creditors during the marriage, at the wife's death, the trust which previously existed for *her use*, was changed, and her trustee held for the use of her children. The slaves were not liable for the husband's debts contracted after the death of the wife, although he came with them to this State, and had them constantly in his possession.

WESTERN DIST. *Sept.* 1837.

YOUNGBLOOD ET AL. *vs.* FLAGG.

The plaintiffs, Thomas Youngblood, for himself, and as tutor of his younger brother and sisters, who are all the children of General William Youngblood, made opposition to the seizure of twenty-three slaves, by the defendant, who claimed the right to sell them, under a mortgage from General Youngblood to himself, for the security and payment for a debt. The mortgage bears date in April, 1832.

The plaintiffs allege, they inherited the largest portion of said slaves, from their deceased mother, being her separate property, as fixed by a marriage settlement, made in the state of South Carolina, between their father and mother on the eve of marriage, in 1800. This act settled in trust several of the slaves now claimed, and their increase, for the use of Mrs. Youngblood during her life, and at her death they were to go to her children. The act of settlement further stipulated, that these slaves were not to be liable for the husband's debts; but, by a law of South Carolina, marriage settlements, etc., in order to have effect against third persons, were required to be recorded in the office of the Secretary of State, within three months from their date. This act was not recorded within that time.

It is further shown, that Mary Rebecca Youngblood, one of the plaintiffs, inherited the slaves Jenny and her four children, under the will of her aunt, which was made and executed in South Carolina, in 1819; that Harry, another of said slaves, was bequeathed to one of the other plaintiffs by this aunt, under the same will.

The plaintiffs, finally allege, and show, that none of said slaves under seizure, ever belonged to their father, who had no authority to mortgage them; that General Youngblood removed with them, bringing with him the slaves in question, from South Carolina, to this State, in 1829, where they have continued to reside. They pray that said slaves be declared their property, and returned to them, and that they be quieted in their possession.

The defendant pleaded a general denial; he averred specially, that the marriage settlement between General Youngblood and wife, in which a portion of these slaves are

settled in trust on the wife and her issue, is to be taken and deemed in fraud of creditors of the husband; it not being recorded according to the laws of South Carolina; that if said slaves originally belonged to the wife, they became vested in the husband by their marriage, agreeably to the laws of South Carolina; and the latter had been long in the possession of said negroes, before mortgaging them to the defendant. The defendant further avers, that if the will, under which a portion of these slaves are claimed, was ever legally made in South Carolina, it was never legally proved and admitted to record in this State, and can have no effect until it is so proven and recorded.

Upon these pleadings and issues the case was tried.

The marriage settlement between the father and mother of plaintiffs, was produced in evidence, made and certified in due form. It was dated in November, 1800, and recorded the 9th June, 1801, about seven months afterwards. A statute of South Carolina, passed in 1785, regulates the effect of marriage settlements, and other similar acts, as follows:

"1. An act to oblige persons interested in marriage deeds and contracts, to record them in the secretary's office, dated January 3d., 1785."

"2. That all marriage contracts or deeds of settlement, which shall hereafter be entered into, for securing any part of the estate, real or personal, in this state, of any person or persons whomsoever, shall *within three months* after the execution thereof, be duly proved, and in like manner to be recorded, except such as shall be recorded or lodged in said office."

The will of Rebecca Mickell, the aunt of the plaintiffs, under which a portion of the negroes were claimed, together with the last wills and testaments of Mrs. Youngblood and Moses Singleton, her father, all duly admitted to probate in South Carolina, were produced in evidence, in support of the plaintiffs' claim.

The defendant exhibited his mortgage, and called several witnesses to prove General Youngblood's embarrassed condition; and also showed that he came to Louisiana, so far back

WESTERN DIST. *Sept.* 1837.

YOUNGBLOOD ET AL. *vs.* FLAGG.

as 1829, with the slaves in question, and settled in Attakapas, as a sugar planter, and exercised all the prerogatives of ownership during this time, and before he left South Carolina.

The district judge was of opinion, the plaintiffs fully made out their title to all the slaves; but that it appeared from some of the evidence, General Youngblood had a life estate in two of them, which was liable for his debts.

Judgment was rendered, decreeing the said slaves to the plaintiffs, and annulling defendant's mortgage.

The defendant appealed.

Lewis and *Bowen* for the plaintiffs.

1. The several wills which constitute plaintiffs' title to part of the slaves claimed, were all regularly admitted to probate, and executed in South Carolina, according to the laws of that state, and by those laws vested the property of said slaves in plaintiffs, and their titles so vested must be respected and enforced by the courts of Louisiana. 1 *Martin, N. S.*, 530–1.

2. The marriage settlement relied on by plaintiffs as their title to another part of the slaves claimed, was a deed of trust, by which the legal title to the property was vested in —— Singleton, until the death of plaintiffs' mother, in 1823, by which event, the legal and equitable title both vested in plaintiffs, and by the laws of South Carolina, could not thereafter be divested by any act of their natural guardian, nor could the same property be affected by him in Louisiana, without pursuing the formalities prescribed by law, in relation to the property of minors. *Louisiana Code*, 3269.

3. There is no law requiring persons removing to Louisiana from another state, to record their titles to property brought with them. 1 *Martin, N. S.*, 528.

4. If such recording were necessary in the case of persons of full age, it cannot be applicable to minors when complaining of the acts of their natural tutor, who brought them and their property to the state, and controls them and it as he choses.

5. If the marriage settlement were not good, as to creditors who became so before it was recorded, still it is good as to subsequent ones.

Caillet, contra.

Martin, J., delivered the opinion of the court.

The defendant is appellant from a judgment, which sustains the opposition of the plaintiffs to the execution of an order of seizure and sale, which he had obtained on a mortgage given him by William Youngblood, their father. Part of the property mortgaged, consisted of slaves, owned by the defendant's mother before her marriage, and conveyed in trust by an act of settlement, to which the future husband was a party. The trust is for the use of the grantee, until the celebration of the marriage and during its continuance, and for the use of the issue of said marriage at her death, etc. etc.

The defendant contended, that the act of settlement is void, as fraudulent in regard to posterior creditors, because it was not duly recorded, as required by the laws of South Carolina, under which it was made, within three months after its date. This is the fact, but it does not appear that the husband had any creditor during marriage and before the death of the wife, at which period the trust which had previously existed for her use, was changed, and her trustee held for the use of the plaintiffs, her children. The right which they thus acquired, became then fixed and irrevocable. Their father could not affect it by any contract of his; neither could any of his creditors consider as his property, slaves to which he never had any right, while that of the wife had ceased and become vested in the plaintiffs, who are her children.

It does not appear, that the mortgagor ever had any claim to the slaves, which constituted the remaining part of the property mortgaged.

The mortgagor came to this state from South Carolina with the plaintiffs, and the slaves in question, twelve years

In a marriage settlement made in South Carolina, to which the future husband, and intended wife, were parties, certain slaves were given in *trust* by her father, for the *use* of the wife, and at her death to go to her children, and this act was never recorded in South Carolina, so as to have effect against the creditors of the husband: *Held*, that as there were no creditors during the marriage, at the wife's death the trust which previously existed for *her use*, was changed, and her trustee held for the use of her children. The slaves were not liable for the husband's debts, contracted after the death of the wife, although he came with them to this state, and had them constantly in his possession.

after the death of his wife, and the slaves were not mortgaged until about three years after his arrival. The slaves were never in his possession as husband of the plaintiffs' mother; and during the time he was in possession of them after her death, he held them in their right. His possession, therefore, could not authorize any one to consider it as giving him any additional credit.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

DUPLESSIS *vs.* BOUTTE ET AL.

APPEAL FROM THE COURT OF THE FIFTH JUDICIAL DISTRICT, FOR THE PARISH OF ST. MARTIN, THE JUDGE OF THE SEVENTH DISTRICT PRESIDING.

Where a debtor cedes *all his property*, both *real and personal*, to his creditors, and afterwards sells a part of it, although not placed on his bilan, such sale will be regarded as a nullity, as being made of property the debtor had no right to sell, and will not support the prescription of one year.

The prescription of ten years, cannot be opposed to a claim for a tract of land, when the act of sale under which it is held, has not been recorded in the parish where the land is situated.

3. The title by which land is held, has no effect as to third persons, when it is not recorded in the parish where the land is situated, according to the act of 1810.

This is an action of partition. The plaintiff alleges, that an order of survey was granted by governor Galvez, then governor of the province of Louisiana, in 1777, to Degruys, Frêres, (four brothers,) of forty arpents of land on each side of the bayou Teche, with the usual depth; and that said grant was regularly confirmed to the grantees, by the government of the United States. He further shows, that one fourth of this tract, or ten arpents on each side, it being the portion coming to Antoine D. Degruys, now belongs to him by

regular sale and conveyance ; and that said tract of land is still in a state of indivision among all the owners ; that one fourth belongs to the estate of D. Degruys, represented by his executor ; another fourth to the estate of Verlin Degruys, represented by his executor, and the remaining fourth to the insolvent estate of J. B. Degruys, now represented by Sosthene Roman, syndic of the creditors ; that he understands that one François C. Boutté, *père*, claims a portion of this land, under some of the original grantees. He prays that they all be cited, and that a partition be made.

Boutté appeared, and averred, that he was the owner of three fourths of the land in question, and was willing for a partition.

S. Roman, as sole syndic of the creditors of J. B. Degruys, claimed one fourth of said land for the creditors. He avers, that in October, 1812, the insolvent made a surrender of his property, in the Territorial Court, in New-Orleans, for the benefit of his creditors, and with a view of defrauding them, concealed his interest in the said tract of land, and failed to place it on his bilan ; that it was not discovered until lately, and if he ever conveyed his interest therein to Boutté, (which is denied,) it was fraudulent, without consideration, and long after the cession of his property. He prays, that if any conveyance be discovered, that it be annulled.

Boutté, amending his answer, denied the syndic's authority to sue, and averred, that if ever he had any right to the land in question, it is barred by the prescription of ten years, and also of one year.

On these pleadings and issues the case was tried by the court.

The only contest was between the syndic and François C Boutté. The latter claimed his one fourth part of the land, under a notarial act from Degruys, dated the 21st May, 1818.

The counsel of the syndic objected to the admissibility of this act in evidence, except as *rem ipsam ;* and they particularly objected to the recitals in the said act being evidence of a previous sale by parole, or otherwise. The court admitted it, and a bill of exceptions was taken to its decision.

WESTERN DIST. *Sept.* 1837.

DUPLESSIS *vs.* BOUTTE ET AL.

The district judge was of opinion, that the plaintiff, Duplessis, was the true owner of one fourth, and that François C. Boutté, *père*, was the rightful owner, by purchase, of the remaining three fourths of said tracts of land, and ordered the case to be sent to a notary for a partition, accordingly.

The court was also of opinion, that the claim of the syndic to have the sale from J. B. Degruys to Boutté annulled, on the ground of fraud against his creditors, was barred by the prescription of one year.

From this judgment the syndic appealed.

Bowen and *King*, for the appellant, contended, that the sale from Degruys to Boutté was null, because the cession of the former, in 1812, vested in the representative of his creditors the right to sell all his property, (except wearing apparel, etc., exempted by law,) to form a fund for the payment of his debts. The insolvent could exercise no rights over his property, inconsistent with the right of the syndic to sell, etc., without previously putting an end to the cession by paying his debts. This he has not done, and it does not appear there is any surplus. *Civil Code, page* 294, *article* 166, 172.

2. The fact, that the insolvent concealed his property, and did not include it in his schedule, cannot enlarge his rights. He is bound to surrender all his property, and cannot retain a part, on the ground that he has given up enough to pay his debts. 3 *Martin*, 232.

3. The act of sale of the 21st May, 1818, from Degruys to Boutté, containing recitals of a previous sale, and consideration money, is no evidence as against third persons. It is only *rem ipsam*, *i. e.* such an act was passed. There is no legal evidence of any previous sale; and a sale by the insolvent after session is void. 3 *Martin*, 386.

4. This sale could vest in the vendee no other or greater rights than the vendor had in the property attempted to be conveyed. If he had no rights he conveyed none, and the conveyance is without consideration, fraudulent and void as to creditors.

5. Boutté cannot claim, under this sale, in virtue of the prescription of *ten years*, because his title is not valid, being a sale without consideration, or a disguised donation ; he is not a possessor in good faith, and has not proved either an actual or civil possession of the premises.

6. The prescription of one year only, runs from the settlement of the insolvent's estate, or from the discovery of the fraud.

Simon, for the appellee, Boutté.

Martin, J., delivered the opinion of the court.

The plaintiff, as vendee of D. Degruys, to whom, and his three brothers, a tract of land had been granted, brought this action against François C. Boutté, who set up title to three fourths of this land, as vendee of the other three brothers.

Sosthène Roman, as syndic of the creditors of Jean Baptiste Degruys, who is one of the vendors of Boutté, contested the title of the latter to the share he purchased from the insolvent. The district court admitted the title of Boutté as valid, and from judgment rendered in his favor, the syndic appealed.

The only question presented for our decision, is, whether Boutté or the syndic be entitled to the share of the insolvent.

The cession took place in 1812, and by a notarial act the insolvent ceded to his creditors all his estate, both real and personal. Nothing was said in the act about the interest which he had in the land, the partition of which is now sought, and it was not placed on the bilan as part of his estate.

Where a debtor cedes *all his property*, both *real and personal*, to his creditors, and afterwards sells a part of it, which was not placed on his bilan, such sale will be regarded as a nullity, as being made of property the debtor had no right to sell, and will not support the prescription of one year.

In 1818, J. B. Degruys sold and conveyed his share in said land to Boutté, by an act passed before a notary public in the city of New-Orleans, the body of which recites, that Degruys had theretofore sold his share in this land by a verbal sale to the said Boutté, who had *then* (fourteen years before the date of the act) paid the sum of three hundred dollars as the consideration of the sale. The notarial act was never recorded in the parish of St. Martin, in which the

WESTERN DIST. *Sept.* 1837.

DUPLESSIS *vs.* BOUTTE ET AL.

The prescription of ten years, cannot be opposed to a claim for a tract of land, when the act of sale under which it is held, has not been recorded in the parish where the land is situated.

The title, by which land is held, has no effect as to third persons, where it is not recorded in the parish where the land is situated, according to the act of 1810.

land is situated. Boutté relied on the prescriptions of one and ten years, on the ground that the syndic was attempting to set aside the sale of Degruys to him, as being made in fraud of creditors, urging that this could not be successfully done after the lapse of one year. *Louisiana Code, article* 1989.

It does not appear to us that the syndic opposes the sale as that of property belonging to Degruys, and which he has sold with a view to defraud his creditors, but as a sale of property which he had already ceded to them, and to which he had no longer any right. The prescription of one year, cannot, therefore, avail the appellee in this case; neither can he successfully oppose the prescription of ten years, because the title under which he claims, has no effect as to third persons, not having been recorded in the parish in which the land is situated, which is required by an act of the legislature passed in 1810.

We have not inquired whether Boutté can avail himself of the recital in the notarial act, because this would be giving some effect to an act, which we have already said, can have none.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be annulled, avoided and reversed; and that partition be made of the land in question, so as to give one half thereof to François C. Boutté; one fourth to the plaintiff, and the remaining fourth to S. Roman, syndic of the creditors of J. B. Degruys; the costs of the appeal to be paid by Boutté, and those of the District Court, out of the property to be partaken.

PERRYMAN ET AL. *vs.* DEMARET.

APPEAL FROM THE COURT OF THE FIFTH JUDICIAL DISTRICT, FOR THE PARISH OF ST. MARY, THE JUDGE OF THE SIXTH PRESIDING.

Where the plaintiffs proved their cattle had been sold by another, without authority, and found in the possession of defendant, they had judgment in the alternative for the *same* cattle, or their value.

The plaintiffs claim several head of cattle branded with their brand, as their property, which they allege are in the possession of the defendant, and for which they pray judgment in kind, or for their value in money.

The defendant pleaded a general denial.

The evidence clearly showed, that about twenty-five or thirty head of the cattle claimed, were sold by one Martin M. Campbell to L. Foster in his life time, and at the probate sale of his succession, they were purchased by the defendant. The witnesses established the identity of the cattle, and the ownership of the plaintiffs. There was no authority shown in Campbell to sell them.

On the part of the defendant, it was shown that she purchased the identical cattle at her husband's probate sale, and also the branding iron with which they had been re-branded.

The district judge gave judgment for twenty-five head of cattle, and in default of compliance, for two hundred and twelve dollars and fifty cents, in money. The defendant appealed.

King, for the plaintiff, contended, that the cattle sold by Campbell to Foster, belonged to the plaintiffs, and that the sale of the thing of another, *is null. Louisiana Code, article* 2427.

W. B. Lewis, contra.

Carleton, J., delivered the opinion of the court.

The petitioners aver, that they were the owners of a number of cattle, which one Martin Campbell, without any

WESTERN DIST. *Sept.* 1837.

HUDSON, SYNDIC, ETC. *vs.* BODIN.

right or authority to that effect, sold and delivered to Levi Foster in the year 1831; that after the death of Foster they were sold through error, as a part of his succession, when the defendant became purchaser. The petition concludes with a prayer for judgment against the defendant for all the cattle and their increase in her possession, and for general relief.

The defendant answers by a general denial, and pleads the prescription of ten, five, four, three, two and one years.

Where the plaintiffs proved their cattle had been sold by another, without authority, and found in possession of defendant, they had judgment in the alternative, for the *same* cattle or their value.

The cause was tried by the court, who rendered judgment in favor of the plaintiffs for twenty-five head of cattle, and in default of delivery, for the sum of two hundred and twelve dollars and fifty cents. The defendant appealed.

At the trial of the cause both parties introduced several witnesses, whose testimony we have carefully examined, and find no reason to be dissatisfied with the conclusion formed by the district judge.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

HUDSON, SYNDIC, &c. *vs.* BODIN.

APPEAL FROM THE COURT OF THE FIFTH JUDICIAL DISTRICT FOR THE PARISH OF ST. MARY, THE JUDGE OF THE SIXTH PRESIDING.

Where mortgage creditors of a tract of land, sold by the mortgagor, enter into a consent rule, together with the third possessor, that it be sold on a particular day, and on certain conditions; the proceeds to be divided according to the rights of the parties, and the auctioneer does not sell it until two months after the time specified, but conformable to the conditions in other respects, the purchaser will hold as against these creditors. They cannot have the sale rescinded on the ground that it was not made agreeable to the consent rule.

In an action for the rescission of a sale, by mortgage creditors, a judgment for defendant and not one of non-suit should be given in case of failure to support the action. The purchase still may be good and yet the land not released from the previous mortgages.

This is an action instituted by the syndic of Bendy's creditors, and of certain creditors of Joseph Dugat and wife, who are alleged to be absentees, to annul and rescind a sale of a certain tract of land to the defendant, on which the creditors of Dugat and wife, allege they have mortgages existing previous to the first sale.

It appears that one Woodruff Bendy purchased this land with other things, from Dugat, the 23d December, 1831. On the 12th February, 1832, Bendy sold this plantation or land, to James Jacobs. On the 24th May, 1833, Bendy sued his creditors, and made a cession of his property, but that now in question was not included. It had been nearly a year before conveyed to Jacobs.

At the time Dugat sold to Bendy, there were several mortgages existing on this land ; and some time before the sale from Bendy to Jacobs, and previous to his failure, several creditors of Dugat, brought suit against him to enforce their mortgages on this land ; among them E. N. Sale, former partner of Dugat. The suit of Bendy *vs.* His Creditors, was carried on together with all the other suits. The parties litigant, contested their rights respectively against each other, when, at the October term, 1833, a consent rule was entered on the minutes, in the suit of Sale *vs.* Bendy, to which Jacobs and Sale particularly consented. This rule authorized the parish judge as auctioneer, to sell the land and improvements on the first Monday of January, 1834, at a credit of one, two and three years, etc. The parish judge, however, did not sell the property until the 1st March following, and made the instalments payable the *first* of January, 1835, '36 and '37, and the defendant became the purchaser, and gave his notes according to the conditions of sale.

This suit was brought by the syndic of Bendy's creditors, to rescind this sale, and have the land restored to the operation of the original mortgages. The mortgage creditors of

WESTERN DIST. *Sept.* 1837.

HUDSON, SYNDIC, ETC. *vs.* BORIN.

Dugat join in the action for rescission. The syndic prays that the sale be rescinded and set aside ; that the defendant be ordered to render an account of all the property and improvements, including those he has sold and removed, and to pay the same into court. The defendant pleaded a general denial ; he averred that the sale and purchase by him, were made in good faith, and after due notice to all the parties interested. He prays that this action be dismissed, etc.

Upon these pleadings and issues the case was tried.

The sale under the consent rule, was not made until the first of March, 1834, but the instalments were made payable at the times specified. The defendant purchased the land at a low rate, (six hundred dollars,) and has since paid the price.

There was judgment for the defendant, rejecting the plaintiff's demand, and dismissing the suit. The plaintiff appealed.

Lewis, for the plaintiffs, contended, that the sale under which the defendant claims, was not made according to the consent rule. It required the sale to be made *on the first Monday of January*, 1834, at a credit of one, two and three years *from the day of sale, etc.;* but the parish judge did not make it until *the first day of March*, 1834, and *not at one, two and three years from the day of sale, etc.*

2. Any one of the parties to the consent rule, by virtue of which the sale was made, has a right to demand that the same be set aside, if that rule has not been complied with ; and his rights cannot be made to depend upon the will of any other person who may refuse to join him in the suit.

3. The purchaser is the proper person with whom to contest the validity of the sale made to him.

4. The plaintiffs had no grounds of complaint against *Jacobs*, and therefore, no right to make him a defendant.

5. The sale to defendant has no other basis on which to rest, but the consent rule, and the said sale not having been made in conformity thereto, must be avoided. It is in proof that the plaintiffs were not present, and never consented to any other terms or conditions of sale, than those contained in the consent rule.

6. At all events the judgment in the District Court is erroneous in this, that it decides upon the merits; and if there are not proper parties with whom the merits of the cause can be litigated, the only judgment that can be given will be one of non-suit.

Simon, for the defendant.

1. This suit is brought to annul the sale made of certain property by the parish judge, as auctioneer, under a consent rule of court, on the ground, that it was not made on the day appointed. The defendant purchased in good faith, and there is no fraud alleged against any party. Although Jacobs and Sale, who both consented to this sale, are not among the plaintiffs, yet they are principally interested.

2. The defendant's title to the land is principally derived from Jacobs, who was the owner at the time, and consented to the sale. The only right which the plaintiffs could set up against the property is a right of mortgage, and nothing else; but Hudson, as syndic of Bendy's estate, cannot set up any claim, because this property was never ceded by Bendy to his creditors. The sale to Jacobs was still in existence, made previous to Bendy's failure. Bendy's syndic has nothing to do with the other plaintiffs, who are Dugat's mortgage creditors.

3. Dugat's creditors cannot proceed against this property in any other manner than by the hypothecary action. It matters not who is in possession, this mode must be pursued. It is most singular that mortgage creditors should begin by attempting to annul a sale made to a third possessor, before instituting the hypothecary action. The law gives no such remedy.

4. It is shown that Sale, one of the mortgage creditors, does not complain of this sale. He consented to it, and received the first instalment out of the proceeds, which he was entitled to under the consent rule. The defendant has paid the *price*, the instalments as agreed on, and who is to re-imburse him? Could he be placed in the same situation

WESTERN DIST. *Sept.* 1837.

HUDSON, SYNDIC, ETC. *vs.* BODIN.

as before, if the sale was rescinded and the property given up? Certainly not.

5. This is not an hypothecary action, but one to rescind and annul a sale. In support of the hypothecary action it is necessary to allege and prove, that the principal debtor has been called on to pay the debt thirty days before calling on the third possessor; and in no case does the law allow the hypothecary action, previous to an amicable demand made on the principal debtor or his representatives, and ten days notice given to the third possessor. 6 *Martin, N. S.*, 310 4 *Louisiana Reports*, 125, 323.

6. The plaintiffs insist, that if they are not entitled to succeed, a judgment of non-suit only should be entered. Why of non-suit? They have directly attacked the title of the defendant, by alleging nullities against it, and demand a rescission of the sale. He has joined issue. They have not established the nullities alleged, nor shown a better title; and the defendant is certainly entitled to judgment, quieting him in his title and possession.

Bullard, J., delivered the opinion of the court.

It appears in this case, that a tract of land belonging to C. Jacobs, upon which the plaintiffs and others claimed to have mortgages, which originated while the land belonged to Dugat, was sold by the parish judge by consent of the owners and the parties interested, in pursuance of an order of court, in the cases then pending. The defendant, a stranger to these controversies, became the purchaser, and gave his notes for the price, which were disposed of according to that order. The agreement and order of court, required, that the land should be sold on the first of January, on a credit of one, two and three years; but the auctioneer did not sell until the 1st of March following, but the price was made payable at the same period designated in the agreement.

The present suit is brought by some of the parties to that agreement, not including one of the creditors who had been

paid out of the price paid by the defendant, and not including Jacobs, the former owner, against the purchaser, for the purpose of causing the sale and adjudication of the land to be rescinded and annulled, on the ground, that the parish judge did not sell in conformity to the order of court, and the agreement of parties; and that he sold for an inadequate price. They further pray that the defendant may be condemned to account for all the improvements removed by him from the place, and that the land may be seized and sold to satisfy their demand.

The contract sought to be rescinded, was essentially between Jacobs, the owner, and Bodin, the purchaser, through the agency of an auctioneer. The intention of the creditors who assented to the sale, was, apparently, that the notes to be given by the purchaser should represent the land, and that the court should proceed to distribute the price according to the rights of the parties. We, therefore, fully concur with the opinion of the district judge, that the rescission of the sale cannot be pronounced between the present parties. The vendor does not demand that a contract to which his assent is essential should be annulled, and yet the effect of rescinding the contract would be to re-invest his title; and one of the creditors who appears to have been paid out of the proceeds of the sale is not made a party. It is clear, therefore, the court did not err in dismissing the petition.

But the appellants complain that the judgment should have been one of non-suit, and that the court erroneously quieted the defendant in his title against their claims. The purchaser's title may be good and yet the land not released from previous incumbrances. That is a question we are not called on to decide in this case, and perhaps the court below would have reserved it if it had been asked.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs; reserving, however, to the parties their rights, if any they have, as hypothecary creditors.

Where mortgage creditors of a tract of land, sold by the mortgagor, enter into a consent rule, together with the third possessor, that it be sold on a particular day and on certain conditions; the proceeds to be divided according to the rights of the parties; and the auctioneer does not sell it until two months after the time specified, but conformable to the conditions in other respects, the purchaser will hold as against these creditors; they cannot have the sale rescinded on the ground that it was not made agreeable to the consent rule.

In an action for the rescission of a sale, by mortgage creditors, a judgment for defendant and not one of non-suit, should be given in case of failure to support the action. The purchase still may be good, and yet the land not released from the previous mortgages.

COX *vs.* HARDING.

APPEAL FROM THE COURT OF THE FIFTH JUDICIAL DISTRICT FOR THE PARISH OF ST. MARY, THE JUDGE OF THE SIXTH PRESIDING.

Where the answers of the plaintiff to the interrogatories of defendant, are corroborated by very strong circumstances, they will outweigh the testimony of two witnesses, who might have mistaken an *hypothetical* for a *positive* contract.

This is an action on a promissory note of the defendant for five thousand five hundred dollars, payable the first of April, 1835. The defendant averred, that this note was given to take up one of six thousand dollars, drawn by Dr. Towles, and endorsed by him, and held by the plaintiff; that some time after the plaintiff proposed to him, to deliver up this note for the one of Dr. Towles, to which he assented; and to carry this agreement into effect, on his return home from New-Orleans, he sent Towles' note to his agent, to be exchanged for the one now in suit, which was refused by the plaintiff. He avers, he is not liable in this action, and prays that it be dismissed. In answer to interrogatories propounded by the defendant, the plaintiff thus explains the nature of the agreement relied on :

"That some time in March, 1835, he met with Mr. Harding, the defendant, and inquired if he could pay the note in suit, at maturity. Instead of giving any reply to the question, he proposed to give in payment, the note of John Towles for six thousand dollars, when it was agreed, that they should meet on the next evening, at the office of C. M. Conrad, Esq., to make an arrangement; that they met, and in the presence of Mr. Conrad, deponent asked Mr. Harding if he would give Mr. Towles' note for his own, if he (deponent) could make an arrangement with Mr. Conrad, to which Mr. H. assented. Deponent then proposed immediately to Mr. Conrad, to receive that note (Dr. Towles' for six thousand dollars) in payment of some money he owed Towles' estate, and which Mr. C. had to collect. Mr. C. *declined*, and deponent informed Mr. H. that nothing could be done.

This is the substance of what passed in relation to the exchange of notes, and which he considered as final; that he had no idea of taking the note of Towles, unless he could negociate it with Mr. C., and this was well understood by the defendant at the time."

Messrs. C. M. and *F. B. Conrad*, were both called as witnesses, to contradict the answer of the plaintiff to the interrogatories on oath. Both these gentlemen were under the impression and belief, and to which they testified on oath, that the arrangement and agreement between Cox and Harding was positive; and that the former, unconditionally, agreed to deliver up to the latter his own note, now in suit, for the one of Dr. Towles, of six thousand dollars.

It was shown that the defendant offered to give up Towles' note for this one, and made a tender of it to the plaintiff through an agent.

The district judge was of opinion, from all the circumstances of the case, that the agreement was not of a character to deprive the plaintiff of his right of recovery. There was judgment in his favor for the amount of the note, from which the defendant appealed.

Simon, for the plaintiff, said, this case presents a question of novation or rather of delegation, for the defendant contends, that the plaintiff has consented to take a new debtor, and that he ought to be discharged. But the novation has never been perfected, the new debtor has never obligated himself to the creditor; that the defendant's note has never been delivered by the plaintiff, and he has never expressly declared that he intended to discharge his original debtor. *Pothier on Obligations, No.* 558, *and following. No.* 564–5, *etc.* 9 *Martin*, 270.

2. There are none of the requisites of a novation or delegation in this case. Propositions were no doubt made to substitute a new debt due by Towles' estate, for that of the defendant, but the evidence shows that the contract has never been perfected.

WESTERN DIST. *Sept.* 1837.

COX *vs.* HARDING.

3. The plaintiff's answers to interrogatories show conclusively that the proposition for an exchange of notes, or substitution of one debt for another, was *conditional* only in case Towles' note could be used in payment of a debt he (plaintiff) owed the estate. The defendant has in vain attempted to contradict the answers; and at all events, he has not shown that the novation resulting from the intended delegation, has been legally completed or perfected.

Lewis, for defendant, insisted, that there was no question of novation, but only one of fact, and which is, that the plaintiff made an absolute and unconstitutional bargain with the defendant, in which he bound himself to deliver up the note in suit, for that of Dr. Towles. This agreement is proven by two witnesses and is binding. It is also shown, that the defendant offered to comply on his part.

Martin, J., delivered the opinion of the court.

This is an action upon a promissory note executed by the defendant. The latter resisted the plaintiff's demand, on the allegation of a contract, by which it was agreed between parties, that the note sued on, should be delivered up, on the defendant's giving to the plaintiff a note for a larger sum, drawn by Dr. John Towles, and endorsed by the defendant. There was judgment for the plaintiff, and the defendant appealed.

The record shows, that the tender of Towles' note was proven, and that the defendant attempted to establish the contract on which he relied, by propounding interrogatories to the plaintiff, whose answers denied it. In order to contradict his answers, two witnesses were interrogated, and the district judge appears to have been of opinion, that the defendant's efforts in this respect, were unsuccessful.

Where the answers of the plaintiff to the interrogatories of defendant, are corroborated by very strong circumstances, they will outweigh the testimony of two witnesses, who might have mistaken an *hypothetical* for a *positive* contract.

After a careful examination of the plaintiff's answers, and the testimony of the two witnesses, we conclude, it is not our duty to interfere with the judgment. The answers of the plaintiff being corroborated by very strong circumstances, in our opinion, outweighs the testimony of the witnesses,

and renders it probable, that they did not well understand the meaning of the parties, and mistook an hypothetical for a positive contract.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

GREIG *vs.* MUGGAH ET AL.

APPEAL FROM THE COURT OF THE FIFTH JUDICIAL DISTRICT FOR THE PARISH OF LAFAYETTE, THE JUDGE OF THE SIXTH PRESIDING.

Where an action was pending in the District Court for a different parish from that in which the defendant resided, and he died: *Held*, that the suit should be sent to the Court of Probates, for the parish where the deceased had his domicil, and there prosecuted against his succession.

Where a succession is in the care of an administrator, and who is tutor of the minor heirs, he is not allowed to accept it absolutely, and can only be sued, or stand in judgment in the Probate Court.

This is an action to recover the sum of four hundred and eighty-nine dollars and thirty-one cents, the balance of an account annexed as due by the succession of John Muggah, deceased.

The plaintiff alleges, that the deceased was indebted to him for a draft on the state treasurer, and for sundry clerk and magistrate's fees; and that his estate is further indebted to him for commissions and clerks' hire, in settling and administering its affairs, making in all the sum he claims. He further shows, that James Muggah, for himself, and as curator of Edward Muggah, an absent brother, has accepted the succession of their deceased brother simply and absolutely, and are liable for all the debts thereof.

WESTERN DIST. *Sept.* 1837.

GREIG *vs.* MUGGAH ET AL.

The defendant denied the correctness of the account sued on; required strict proof of every item, and the rejection of such as were not so proved. He pleaded payments to a large amount exceeding any aggregate sum due, and for such excess claimed judgment in re-convention. Prescription was also opposed to the fee-bill items.

When the cause was thus at issue, referees were appointed, who reported a considerable balance in favor of the plaintiff. In this stage of the cause, James Muggah died; his legal representatives and heirs were made parties and cited in. No curator or other representative was appointed for Edward Muggah, who resided in England.

The heirs and legal representatives of James Muggah, denied the jurisdiction of the District Court. They averred, that the Court of Probates for the parish of St. Mary alone, had jurisdiction in the case, being the place of their ancestor's domicil, where his succession was opened, and where they resided. They further objected to the report of the referees.

Upon these pleadings and issues, the case was tried before the court.

Without noticing the plea to the jurisdiction, or any other matter in the pleadings, the district judge went on to state an account between the parties upon the evidence produced, and rendered judgment in favor of the plaintiff, for three hundred and twenty-five dollars and fifty-nine cents; from which the defendants appealed.

Lewis, for the plaintiff, contended against the plea to the jurisdiction; and urged, that this court clearly had jurisdiction as to James Muggah, personally, so soon as he had pleaded to the merits; his subsequent death could not oust that jurisdiction when it once attached. *Code of Practice, article* 21, 120, 361.

2. Each heir of a succession who has accepted the same, purely and simply, is bound for his *virile* portion of each debt of the succession so accepted. *See Mudd* vs. *Stelle's Heirs.*

Louisiana Code, 1214–15, *and* 1370, 1372, 1376. *Code of Practice*, 40.

3. It is admitted, that so far as Edward Muggah is concerned, no judgment could be rendered, but the plaintiff ought to be maintained in his judgment for the one half of his claim, as against James.

4. There is no law authorizing this cause to be transferred to the Court of Probates, in the parish of St. Mary, or from one court to another, except in one or two special cases that are not provided for in either of the codes, but by special statutes; that when a party has mistaken the court, before which his action ought to have been brought, the only thing the court can do is to dismiss it.

5. This court clearly had jurisdiction of one half of the claim as against Edward Muggah, whose only interest is in the parish of Lafayette, where the succession of John Muggah was opened, and where alone a curator to Edward, an absentee, could be legally appointed. *Court of Probates*, 50, 1105.

Splane, for defendants.

1. The heirs and legal representatives of James Muggah, could only be sued in the Court of Probates, for the Parish of St. Mary, where the succession was opened. The District Court has no jurisdiction whatever in suits against a succession. 1 *Louisiana Reports*, 526.

2. The Probate Court has exclusive jurisdiction of suits against the curator of an absentee. *Code of Practice*, 983.

3. In this case there was no curator when judgment was rendered, to represent E. Muggah. Curatorship is a personal trust and dies with the person appointed. *Louisiana Code*, 52–3.

Martin, J., delivered the opinion of the court.

The plaintiff brought this action against James Muggah in his own right, and as curator of Edward Muggah, his brother, an absentee, and heirs of John Muggah, deceased, on a balance of account.

WESTERN DIST. *Sept.* 1837.

GREIG *vs.* MUGGAH ET AL.

The defendants pleaded payment, compensation, prescription, etc. Afterwards, the defendant, James Muggah, died, and his heirs and legal representatives, were made parties; but no step was taken in relation to the defendant, Edward Muggah, the curatorship of whom expired on the death of his brother James.

The new defendants added the general issue to the former pleas, and that the District Court of the parish of Lafayette, had no jurisdiction, but that the suit should have been brought in the Probate Court, for the parish of St. Mary, where their ancestor lived, and where they now reside.

Where an action was pending in the District Court, for a different parish from that in which the defendant resided, and he died: *Held*, that the suit should be sent to the Court of Probates, for the parish where the deceased had his domicil, and there prosecuted against his succession.

There was judgment against the defendants, for the sum of three hundred and twenty-five dollars and fifty-nine cents, the whole amount ascertained to be due from the deceased, John Muggah, to the plaintiff. The defendants appealed.

It is clear that the plea to the jurisdiction of the District Court, should have been sustained; not because the deceased James Muggah, was a resident of another parish than that in which he was sued, for he had waived his right to be sued in his own parish, but because his succession was in the care of an administrator, who was also tutor to the heirs, and who could not accept the succession absolutely; such defendants are suable only in the Court of Probates.

Where a succession is in the care of an administrator, and who is tutor of the minor heirs, he is not allowed to accept it absolutely, and can only be sued or stand in judgment in the Probate Court.

The defendant, Edward Muggah, was out of court by the death of his curator, and no legal steps were taken for the appointment of another.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be annulled, avoided and reversed, and that the case be transferred to the Court of Probates, for the parish of St. Mary; and that the plaintiff and appellee pay costs in both courts, reserving to him the right to claim before the Court of Probates, those incurred in the District Court.

HEBERT'S HEIRS *vs.* HEBERT'S LEGATEES.

APPEAL FROM THE COURT OF PROBATES FOR THE PARISH OF LAFAYETTE.

A witness to a will who does not understand the language in which the will is written, is incompetent to attest it. It is impossible he can compare what is written by the notary, with that which was spoken by the testator.

Incapacity or incompetency of witnesses to a will, is not limited alone to the classes of persons enumerated in the fifteen hundred and eighty-fourth article of the Louisiana Code.

This is an action by the heirs at law of Dorothée Hebert, deceased, against Joseph, Ursin and Marguerite Hebert, also collateral relations of the deceased, to recover from them her estate, which the defendants' claim and possess under her last will and testament, as her universal legatees.

The plaintiffs allege, that Dorothée Hebert died without leaving ascendants or descendants, and that they are her nearest collateral relations and heirs at law, and as such entitled to her succession. They further allege, that the will under which the defendants claim this estate, is null and void, on the following grounds :

1. Because it was not written by the notary in the language in which it was dictated; it being dictated in French and written in the English language, which was not understood by the testatrix.

2. Said will was not made in the presence of the legal number of competent witnesses, there being but three; one of whom was unacquainted with the French language, and could not understand what was dictated; another understood no English, and both him and the testatrix were unable to understand the contents of the will when it was read to them.

3. Because said will was not read to the testatrix as written, in the presence of three competent witnesses, who could understand the dispositions therein contained.

Sept. 1837.
WESTERN DIST.

HEBERT'S HEIRS
vs.
HEBERT'S
LEGATEES.

The plaintiffs further showed, that the defendants have in their possession a number of slaves, which they are bound to deliver up, and account for their hire. They pray that the defendants be cited, and that they have judgment annulling the will, and ordering the succession of Dorothée Hebert to be delivered to them, together with the slaves belonging to it, in the possession of the defendants.

The defendants averred they held the property of the said succession, under a valid and legal will of the deceased, as her universal legatees. They pray that the will be declared valid, and that they be quieted in their title and possession of the property in question, under said will.

The testimony showed, that Lafort, one of the witnesses to the will, spoke no English, and when he had any transaction with an American, he had to procure an interpreter. Another of the witnesses was ignorant of the French language, and the third was dead.

The parish judge who received the will, testified, that he does not know whether the testatrix understood any English or not; he conversed with her in French, and she dictated her will in that language which he wrote out in English, and read to the testatrix and the witnesses in both languages.

It was in evidence, however, that the testatrix spoke no English, and did not understand it well enough to transact business with persons, who were ignorant of the French language.

The will was signed by three witnesses, and made in the nuncupative form by notarial act. It was recognized by the two surviving witnesses, who also testified that it was read in their presence and hearing, and that of the testatrix.

The judge of probates pronounced the will legal and valid, and dismissed the suit. The plaintiffs appealed.

Voorhies, for the plaintiffs.

This is an action instituted in the Court of Probates to set aside a will, on account of vices of nullity in its execution. The law renders null any will not made in strict conformity

to its dictates and directions. Want of formality is a vice of nullity. *Louisiana Code, article* 1588.

2. In France it is permitted by law to write a will in a different language from that in which it is dictated; but, by our law, a will must be written "*as it is dictated*" or it is null. How can a will be written *as dictated* when it is dictated in one language and written in another? *Louisiana Code, article* 1571. 6 *Martin, N. S.* 146.

3. The will under consideration, was not read in the presence of three competent witnesses. One of them did not understand the language in which it was written. A witness cannot be competent to attest that which he does not understand. 9 *Duranton*, 112. *Pothier Traité sur les Testamens, verbo témoin, No.* 12, *page* 245.

Crow, for the defendants, contended, that this will was made in strict conformity with the law. It was written according to the dictations of the testatrix, as the parish judge testifies; and although written in the English language, it was explained to her in the language in which she dictated it, so that in fact, it was *written as dictated.*

2. All persons are good witnesses to a will, except those who are expressly excluded by law. It can no where be found, that a witness is incompetent on account of a difference of language. Interpretation supplies the want of a knowledge of the language in which a transaction is had, in those who are incapacitated from being witnesses to a will. See *Louisiana Code, article* 1584.

3. But the witness (Lafort) who is objected to here, as incompetent, for not understanding the language in which the will *is written*, is, in fact, a perfectly good and competent witness, because he understood the language in which it was *dictated*, and heard the testatrix dictate it. 5 *Toullier, page* 300, 365.

Simon, for plaintiffs, in reply.

1. The testament in this case, is null on two grounds: 1st, because it has not been written *as it was dictated*; it being

WESTERN DIST. *Sept.* 1837.

HEBERT'S HEIRS *vs.* HEBERT'S LEGATEES.

dictated in French, and written in the English language. The testatrix did not and could not understand the translation and the will, as it was written. *Louisiana Code, article* 1571. 6 *Martin, N. S.* 143.

2. How can it be said that the law has been complied with, when the expressions of the will are not the same as dictated, and when the testatrix herself could not judge of the testament's being written as she dictated it? The notary had no right to act as interpreter; our law recognizes no such ministerial officer in the execution of a will.

3. The witnesses to this will, were not competent; one of them did not understand a word of English; another knew scarcely any French, which was the language of the testatrix, and that in which the will was dictated. The first could not attest the will as being written according to the dictation, and the last could know nothing of the dictation. *Nouveau Desgodets, Vol.* 1, *page* 105. 5 *Toullier, No.* 393. 9 *Duranton, No.* 79. *Merlin's Repertoire, etc., verbo témoin instrumentaire, section* 11, *No.* 24. 10 *Dalloz, page* 463.

Carleton, J., delivered the opinion of the court.

This action is brought to annul the last will and testament of Dorothée Hebert, whose heirs and legal representatives the petitioners allege themselves to be.

The causes of nullity, alleged, are:

1st. That the will was dictated in the French language, but written by the notary in English, which was not understood by the testatrix.

2d. That of the three subscribing witnesses to the will, one of them was not sufficiently acquainted with the French to have understood it in that language, and that one other witness was absolutely ignorant of the English language, in which the will was actually written.

3d. That the will was not read to the testatrix, as it was written, in the presence of three witnesses competent to understand the dispositions it contained.

The defendants, in their answer, insist on the validity of the will, and pray that they may be quieted in the possession and enjoyment of the property they hold under it.

The court gave judgment for the defendants, and the plaintiffs appealed.

The will is drawn up in the English language, in the nuncupative form, by public act, executed by the parish judge, officiating as notary public.

On the part of the plaintiffs, Antoine Bagazzoni, testified, that he had known François Lefort, one of the subscribing witnesses, for twenty years; that he never heard or knew that he spoke the English language; that Lefort, having some short time since, some explanation to make with an American, inquired of witness whether he could interpret for him.

A witness to a will who does not understand the language in which the will is written, is incompetent to attest it. It is impossible he can compare what is written by the notary, with that which was spoken by the testator.

As this testimony stands uncontroverted, it appears to us sufficiently proved, and not denied in argument, that Lefort did not understand the English language, and therefore, could not know whether the will contained the dispositions intended by the testatrix. It was impossible he could have compared what was written by the notary, with what was spoken by the testatrix. He could not, therefore, testify to the faithful execution of the will, and for all legal purposes, might as well have been absent in a distant place.

But, it is contended by defendants' counsel, that, inasmuch as all persons who are by law incapable of being witnesses to testaments, are specially enumerated in article 1584 of the *La. Code*, it follows, necessarily, that all other persons whatever, are competent witnesses for that purpose. In this opinion we do not agree with the counsel.

Incapacity or incompetency of witnesses to a will, is not limited alone to the classes of persons enumerated in the article 1584, of the Louisiana Code.

The legislature have manifested great solicitude on the subject of last wills and testaments, and endeavored, by every possible safeguard, to ensure their faithful execution. They have required, that nuncupative wills by public act, should be attested by three witnesses, and read in their presence, to the testator. This wise precaution, and strongest barrier which the law interposes for the protection of the testator, would be vain and nugatory if the witnesses were incompetent to the trust they were called to fulfil. Language is the vehicle of thought, and if the witnesses could not understand that in which the will was written, it is plain they

WESTERN DIST. *Sept.* 1837.

COX'S EXECUTORS *vs.* THOMAS.

would be in no better situation than the deaf who are expressly declared incompetent by the law cited by the counsel. *Eadem est ratio eadem est lex. Louisiana Code, art.* 1571.

It appears to us, that Lefort was not such a witness as the law requires to be present at the making of a will, and that therefore, the testament under consideration, is void, for want of a sufficient number of competent witnesses.

The opinion we have formed upon this subject, renders it unnecessary for us to notice any other ground of nullity or point raised by either party to the cause.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Court of Probates, be avoided and reversed; that the said last will and testament of said Dorothée Hebert, be, and the same is hereby rejected, and that the defendants pay costs in both courts.

COX'S EXECUTORS *vs.* THOMAS.

APPEAL FROM THE COURT OF THE FIFTH JUDICIAL DISTRICT, FOR THE PARISH OF ST. MARTIN, THE JUDGE OF THE SIXTH PRESIDING.

The functions of the District Court, in relation to a mandate which has issued from this court, to have a judgment executed, *are merely ministerial.* It cannot render any new judgment which would authorize or render an appeal necessary.

The duty of the inferior court, is to obey the mandate of the Supreme Court. If it does not, the party obtaining the judgment, must seek its enforcement by an application for a *mandamus.*

In relation to the execution of final judgments, neither party is entitled to an appeal. The remedy is by a *mandamus* or *supersedeas.* An appeal is a matter of right in cases where it lies.

This case was commenced by a petition, concluding with a prayer, that the defendant be cited and ruled, to show cause

why a certain judgment, revised by the Supreme Court, should not be made absolute and unconditional against him, and execution ordered to issue thereon, and to have the same satisfied according to the import and tenor of said judgment.

The facts of the case show, that at the September term, 1836, of this court, sitting at Opelousas, a judgment was rendered in favor of N. Cox, of New-Orleans, against David Rees, and J. H. Thomas, decreeing as follows :

" It is ordered, adjudged and decreed, that the plaintiff recover from the defendant, D. Rees, as principal, and J. H. Thomas, as surety, the sum of one thousand four hundred and ninety-eight dollars, etc. It is further ordered, that the land specified in the petition, as mortgaged for the security of the original debt, *be first seized and sold to satisfy the sum of one thousand four hundred and ninety-eight dollars, etc.*" *See* 10 *Louisiana Reports*, 232.

On the return of the mandate to the District Court, it was ascertained, that the tract of land ordered *first to be seized and sold*, had been already sold under a previous mortgage to that of the plaintiff, and consequently, this part of the decree of the Supreme Court, became an *impossible condition.* But execution issued according to the decree, and the sheriff returned the fact of the land being previously sold, and the estate of Rees, in a course of administration in the Probate Court, as an insolvent one.

The plaintiff then commenced the present proceedings, praying that the defendant, J. H. Thomas be cited and ruled, and ordered to show cause why the judgment should not be made *absolute and conditional*, and execution issue against him accordingly. The defendant answered, and averred that the judgment of the Supreme Court, was absolute, and had the force of *res judicata*, and could not be amended. He prays that this proceeding be dismissed with costs.

On this state of the case, the district judge rendered judgment *absolutely* against the defendant, for the sum con-

WESTERN DIST. *Sept.* 1837.

COX'S EXECUTORS *vs.* THOMAS.

tained in the judgment of the Supreme Court. The defendant appealed.

Voorhies, for the plaintiff, contended, that this proceeding was simply a rule for the defendant to show cause, why the plaintiffs shall not carry into effect the judgment of the Supreme Court. The defendant seeks to avoid this judgment, by requiring the land purporting to be mortgaged by Rees, to be first discussed and proceeded against, before coming on him. This is shown to be impossible as it has previously been sold under a prior mortgage.

2. The defendant's responsibility as surety attached, and his liability became absolute on the land proving insufficient. It has proved insufficient in this case by being sold at another and prior sale.

Brent and *Simon*, for the defendant, urged, that this was a suit to amend a judgment of the Supreme Court, which has the force of *res judicata;* and to make that an unconditional, which is, in fact, a conditional judgment, requiring something to be done before the defendant is liable.

2. The object of this suit cannot be obtained in the present form. There are four ways to amend or alter judgments. In this court it can only be done by a re-hearing; those of the inferior courts are reached by appeal, action of rescission, or nullity.

Martin, J., delivered the opinion of the court.

The functions of the district court, in relation to a mandate which has issued from this court, to have a judgment executed, *are merely ministerial.* It cannot render any new judgment, which would authorize or render an appeal necessary.

This court, at its last September term, in Opelousas, rendered judgment in favor of the plaintiffs' testator, against Rees and the present defendant, his surety, with a stay of execution as to the latter, until a tract of land mortgaged by Rees, should be seized and sold to satisfy the judgment.

The present suit was brought, on a suggestion, that the tract of land in question, had theretofore been sold, and the proceeds absorbed by a prior mortgage, and in order to have the judgment of this court made absolute, so as to obtain

The duty of the inferior court is to obey the mandate of the Supreme Court. If it does not, the party obtaining the judgment must seek its enforcement by an application for a *mandamus.*

In relation to the execution of final judgments, neither party is entitled to an appeal. The remedy is by a *mandamus* or *supersedeas.* An appeal is a matter of right in cases where it lies.

execution against the defendant. Judgment was accordingly rendered, and he appealed.

It is clear that these proceedings were irregular. The functions of the District Court in relation to a mandate which has issued from this court to have a judgment executed, are merely ministerial. It cannot render any new judgment which would authorize or render an appeal necessary. Its duty is to obey the mandate; if it does not, the party obtaining the judgment must seek its enforcement by an application for a *mandamus;* and the party against whom the judgment was rendered, if he thinks himself injured by the manner in which execution is ordered, must seek relief by a *supersedeas.* Neither of them is entitled to an appeal, which is a matter of *right,* in cases where it lies. Not so of the *mandamus* or *supersedeas.* These are always in the discretion of the court, and are never granted unless a proper case be made out. They issue from the court that rendered the judgment, and which is considered to be the best judge of the manner of executing its own judgments.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be annulled, avoided and reversed, and the petition dismissed; the plaintiffs and appellees paying costs in both courts.

HAYS *vs.* MARSH.

APPEAL FROM THE COURT OF THE FIFTH JUDICIAL DISTRICT, FOR THE PARISH OF ST. MARTIN, THE JUDGE OF THE SIXTH PRESIDING.

Where an overseer abandons his employer before the end of his year, on pretence of sickness in his family, when he is not prevented personally by bad health from performing his duty, he will lose all the wages he has earned.

WESTERN DIST. *Sept.* 1837.

HAYES *vs.* MARSH.

This is an action by an overseer against his employer, for the recovery of wages due.

The plaintiff alleges, that in the year 1833, he was employed by the defendant to superintend his plantation, as an overseer, for the sum of five hundred dollars per annum; that he remained in this employment eight months and a half, and left his employer, for which time he was so engaged, he claims three hundred and fifty-three dollars and sixty-five cents.

The defendant admitted he employed the plaintiff, on the terms and conditions stated; but that he left his employment without any just cause, in the busiest season of the year, and before his term expired.

The defendant avers, that the plaintiff is not entitled to any wages, having violated his engagement, and left his sugar plantation without taking off his crop, in consequence of which, he has sustained a loss of at least forty hogsheads of sugar, worth two thousand five hundred dollars, and for which he claims judgment in reconvention.

Upon these pleadings and issues the parties proceeded to trial, before the court and a jury.

The plaintiff called three witnesses, who failed to testify to the causes for which he left the defendant's employment. The latter produced no witnesses, and submitted the case on the plaintiff's evidence.

After the argument had commenced the plaintiff offered other witnesses, which were objected to by the defendant's counsel, as coming too late; the testimony, thus offered, being neither to rebut any evidence of the plaintiff, nor to explain or lessen the weight of any offered by him. The court admitted the evidence, and a bill of exception was taken. These witnesses testified, that the plaintiff quit the defendant's employment, and left his plantation on account of some sickness in his family, and his apprehensions that the season would be very sickly.

The jury returned a verdict for the plaintiff. After an unsuccessful attempt to obtain a new trial, the defendant appealed.

Splane and *Simon*, for the plaintiff, insisted, that the evidence showed that the plaintiff had good cause for leaving the defendant's employ before the end of the year. The place where the plantation is situated became very unhealthy; the plaintiff's wife and all his family were sick, and in imminent danger of their lives. This was good and legal cause to leave.

2. The plaintiff being forced to leave the plantation by circumstances above his control, should not thereby lose the wages he has already earned.

3. It is only daily laborers or servants who lose their whole wages, when they quit their employment before the time agreed on. *Louisiana Code*, 2719.

4. But overseers, as was the case here, are employed on a salary of so much per annum, which is payable quarterly. They are entitled to so much of it as is earned, when they leave for good cause. In this case the jury have pronounced the *causes* which induced the plaintiff to leave the defendant's employ before the end of the year, to be good and sufficient. In such cases the verdict should not be disturbed.

King, for the defendant, contended, that the judgment should be reversed, because the plaintiff should not have been allowed to introduce other witnesses after he had closed his evidence and the argument begun. He is only permitted to call additional witnesses to rebut or lessen the weight of the defendant's testimony, *when he has produced any, etc. Code of Practice*, 477, 484. 7 *Martin, N. S.* 57. 5 *Louisiana Reports*, 451.

2. The plaintiff hired his services for a stipulated sum, by the *year*, as an overseer, and having left his employer before the expiration of his term, without any just cause of complaint, he thereby forfeited *all his wages* for the time he served. *Louisiana Code*, 2719, 2720–21.

Lewis, on same side, said, the plaintiff had showed no cause of action in his petition. The evidence which he was allowed to introduce after the argument of the case had com-

WESTERN DIST. *Sept.* 1837.

HAYES VS. MARSH.

menced, does not show any good or sufficient cause for leaving the defendant's employ at a time when he was most needed to take off the sugar crop.

2. Even if the evidence relied on is not excluded as it ought to be, it shows a complete violation of his contract by the plaintiff. Instead of his getting any wages the defendant is entitled to damages, if he choose to have shown them, (as he could,) by testimony.

Carleton, J., delivered the opinion of the court.

The plaintiff in his petition claims the sum of three hundred and fifty-three dollars and sixty-five cents, for eight and a half months services rendered as overseer on defendant's plantation in 1833, at the rate of five hundred dollars per annum.

The defendant for answer, avers, in substance, that before the expiration of the year for which the plaintiff was employed, he abandoned the plantation without any lawful cause, in violation of his engagement, at a time when his services were most necessary for the preservation of the crop, by reason of which, he, the defendant, sustained damages to the amount of two thousand five hundred dollars, for which he sues in reconvention.

The cause was submitted to a jury who found a verdict for the plaintiff, and the judgment of the court having been pronounced accordingly, the defendant appealed after an ineffectual attempt to obtain a new trial.

A bill of exceptions was taken to the opinion of the court in the progress of the cause, by defendant's counsel, which, from the view we have taken of the merits of the case, it is not necessary further to notice.

Though the plaintiff does not, in his petition, set out his motives for withdrawing from the services of his employer before the expiration of the year, yet the cause is fully explained by the testimony of the witnesses. From them we learn, that his wife fell sick in September, 1833, and her husband thinking it necessary to remove her from the plan-

tation, followed, that he might remain with her during her illness, and that he did not afterwards return to fulfil his contract.

This court have ever been reluctant to disturb the verdict of a jury, where the controversy turned upon mere matters of fact. But in the case before us, they have pronounced upon a matter purely of law; for such we deem to be the question raised by the plaintiff, in the excuse he sets up for the non-fulfilment of his contract.

By article 2721, of the *Louisiana Code*, it is provided, that if "a laborer, after having hired out his services, should leave his employer before the time of his engagement had expired, without having any just cause of complaint against his employer, the laborer shall then forfeit all the wages that may be due, and shall, moreover, be compelled to repay all the money he has received, either as due for his wages, or in advance thereof on the running year, or on the time of his engagement."

The reason of the law may well apply to the case under consideration. Overseers are generally employed by the year, and their duties can seldom be performed in a shorter period. The agricultural interests of the country are mainly under the control of this description of men, and if they could abandon their employers in time of greatest need, on such pretences as are set up by the plaintiff, it is plain that great and remediless mischief would ensue.

Where an overseer abandons his employer before the end of his year, on pretence of sickness in his family, when he is not prevented personally by bad health from performing his duty, he will lose all the wages he has earned.

The services he was bound to render were personal, and the sickness of any member of his family, is no excuse for a breach of their performance. It does, therefore, appear to us, that by abandoning his undertaking before the lapse of time fixed by the contract, the plaintiff has forfeited all claim to wages for any services he may have performed.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be avoided and reversed; that the verdict of the jury be set aside, and that there be judgment for the defendant with costs of suit in both courts.

WESTERN DIST.
Sept. 1837.

DURRIVE ET AL.
vs.
FRERE.

DURRIVE ET AL. *vs.* FRERE.

APPEAL FROM THE COURT OF THE FIFTH JUDICIAL DISTRICT FOR THE PARISH OF ST. MARY, THE JUDGE OF THE SIXTH PRESIDING.

Where, in a contract, certain facts are expressly stated, all the consequences necessarily resulting from them are implied, and enter into the contract.

Where a planter sells his sugar crop on his plantation, for a certain price, and at the same time apprises the buyer that his agents in New-Orleans have authority and directions to sell it, the contract of sale will be considered as made under an implied or tacit suspensive condition, and the seller is only bound to comply in case his agents have not sold in the meantime.

Whatever in a contract would have been clearly assented to by both parties, if it had been mentioned at the time, makes part of it.

This is an action for damages on account of the non-delivery of a quantity of sugar agreeably to an alleged contract.

The plaintiffs allege, that Charles De Blanc, a member of their commercial firm, on the 15th December, 1835, contracted with the defendant for the purchase of his sugar crop of that year, being one hundred and seventy-six hogsheads of prime sugar, at eight and a half cents per pound, to be delivered in a few days on his plantation; that the defendant failed and refused to deliver said sugar according to his agreement, whereby he is liable to pay damages for the amount of nett profits they might have made, had the sugar been delivered. They further show, that had said sugar been delivered at the time agreed upon, they could have sold it for twelve and a half cents per pound, which would have yielded them a profit of seven thousand eight hundred and fifty-four dollars, for which they pray judgment, as damages.

The defendant pleaded a general denial, and averred, that he admits Charles De Blanc, one of the plaintiffs, made a proposition to him in December, 1835, to buy his sugar crop, at eight and a half cents per pound, to which he assented;

but that the said Charles was at the same time apprised, and knew the fact well, that Lastrapes & Desmare, commission merchants in New-Orleans, were his agents to sell his sugar, and had full power and authority to sell it to any other person; that these agents in the mean time, and before they could have any knowledge of this transaction, did sell the said sugar, and this respondent could not do otherwise than abide by and comply with the terms of the sale so made. He avers that this action is unjust and illegal, and prays that it be dismissed.

Upon this issue the cause was tried before a jury.

The evidence showed, that about the same time the agreement sued on was entered into, Lastrapes & Desmare sold the sugar in question, in the city of New-Orleans, for nine cents, deliverable on the plantation of defendant, in the parish of St. Mary, the 15th January following.

Desmare, a witness, says, that De Blanc called on him in New-Orleans, early in December, and he proposed to sell defendant's, and several other sugar crops in the neighborhood to him at eight and a half cents, cash, which he refused to give; that De Blanc started to Attakapas, in a day or two afterwards. Witness received a letter from A. Fusilier, senr., dated the 12th December, 1835, whose sugar was included with that of the defendant's, that he would have been satisfied with the price he offered the sugar to Durrive and De Blanc at, and as he had not seen Mr. De Blanc yet, in Attakapas, he (witness) might sell the sugar to whom he pleased; and upon this letter the sugar was sold in New-Orleans. Witness states that from the manner in which plaintiff called on him to buy the sugar in question, they must have known he had authority to sell it for defendant.

A. Fusilier, fils, a witness, says, that he received a letter from Lastrapes & Desmare, dated in New-Orleans, early in December, and brought by the same boat in which Mr. De Blanc came up, in which they state that sugar was worth eight and a half cents on the plantations; that he (witness) showed this letter to De Blanc, who said they (L. & D.) had spoken to him in the city about the sale of sugar in Attakapas, but had come to no conclusion.

WESTERN DIST. *Sept.* 1837.

DURRIVE ET AL. *vs.* FRERE.

The whole evidence showed, that at the time De Blanc made the bargain with defendant for his sugar, in the parish of St. Mary, that he knew that Lastrapes & Desmare had authority to sell the same sugar in New-Orleans; that Lastrapes & Desmare advised the defendant, and others, by letter, dated 18th December, 1835, that they had sold their sugar for nine cents per pound, in New-Orleans. The defendant refused, on receipt of this information, to deliver his sugar to plaintiffs, except about three hogsheads which he made a present to them.

The district judge who presided at the trial, instructed the jury as follows:

"There are two sales of the sugar in question; the first in point of time, was made by defendant to plaintiffs; the second, by defendant's agents in New-Orleans, to another person. Either of these sales would be good against the seller, and whichever buyer first got possession, would hold the sugar against the other. As far as depended on the mere agreement of sale without delivery, the first in point of time would be considered best, if there was a contest between the buyers; but even the last sale was binding on the seller, as his agents were authorised to sell, and did not know that their power was at an end. The principal was bound to ratify it.

"It is urged, that plaintiffs knew at the time they bought of defendant, that his agents were authorised to sell the same sugar in New-Orleans, and were aware of the probability of its being then sold, or before the agents could be informed, etc.; that defendant sold in the belief that his agents had not sold, or sold under the implied condition that it had not been sold by his agents, or would not be sold before he could inform them of this sale. If there had been an expressed condition of this kind, there would be no difficulty; this sale would be suspended by it, until it could be known whether it would be sold by defendant's agents when they heard from their principal; but there is no expressed condition."

"The first question for the jury to consider or to ascertain, is, whether this was understood by both parties. If the evidence and circumstances of the case show that defendant

made the sale on condition or belief that his agents should not have made it when they would hear from him; and whether plaintiffs knew that defendant acted from this motive, and on this belief. If the evidence shows that this was the motive of defendant, and that plaintiffs knew it, and from all the circumstances of the case, this condition was clearly understood between them, then this tacit condition would be as binding on them as if it had been expressed; and that the plaintiffs would have no right to recover damages, because it would be a sale with a suspensive condition understood."

Exceptions were taken to parts of this charge.

There was a verdict and judgment against the defendant of ten dollars in damages and costs, and the plaintiffs appealed.

On the appeal the defendant prays, that judgment be rendered in his favor.

Caillet and *W. B. Lewis*, for plaintiffs.

1. It was not necessary to put defendant *in mora*, because the violation of the contract complained of, was *active*. *Louisiana Code*, 1925, 1926, and 1927. *n.* 1.

2. The proper measure of damages is the *loss* plaintiffs have sustained, and the profits of which they have been deprived by defendant failing to comply with his contract. *Louisiana Code*, 1928. 6 *Toullier*, 273. *n.* 263.

3. Defendant is liable for such damages as may reasonably be supposed to have been contemplated by the parties, at the time of making the contract. *Louisiana Code*, 1928. *n.* 1. 6 *Toullier*, 275–6. *n.* 264.

4. The damages ought to be estimated according to the value of the sugar in New-Orleans, the port of its destination, and the place where defendant knew plaintiff intended to convey and sell it.

Simon and *Bowen*, for defendant.

The plaintiffs' agent (C. De Blanc) had full knowledge when he contracted, of the defendant having authorised his agents in New-Orleans, to sell the sugar in question. De

WESTERN DIST. *Sept.* 1837.

DURRIVE ET AL. *vs.* FRERE.

Blanc had himself applied to the agents in New-Orleans, before he came to Attakapas, to purchase this sugar, and instead of closing the bargain with them, came and applied to the principal at his plantation, expecting to get a better bargain; but he knew at the same time, the agents could sell immediately to any other person. He made the contract with the defendant, knowing all this, and of course run the risk of its being sold in New-Orleans.

2. The plaintiffs' agent and partner, purchased the defendant's sugar crop with the *tacit* condition, that it could be delivered only in case it was not sold in New-Orleans. It having been so sold, the condition applies, and the defendant is not bound to deliver the sugar to the plaintiffs.

3. As to the question of the sufficiency or insufficiency of damages, they cannot in any event amount to more than the difference of the price, between the time of contracting and that of executing the obligation; and that the rule of damages should be the price of the article at the time and place of delivery. *Louisiana Code*, 1928, 2418. 6 *Toullier*, *No.* 540. 12 *Martin*, 675. 8 *Louisiana Reports*, 521. *Domat*, *liv.* 1, *title* 2, *section* 2, *Nos.* 16, 17, 18. 14 *Johnson*, 128, 170. 3 *Wheaton*, 200. 3 *Cranch*, 297. *Wharton's Digist*, 108, *Nos.* 39, 40.

Martin, J., delivered the opinion of the court.

The facts of this case are these: The plaintiffs are merchants, and partners; one of them came to the defendant's plantation to purchase his crop of sugar, and was informed that he might have it at the price he offered, but was told that the defendant had before that time given orders to his commission merchants, in New-Orleans, to dispose of it. On hearing afterwards that they had done so, the defendant declined delivering the sugar to the plaintiffs. The present suit is brought, to recover in damages, the profits which the plaintiffs allege they would have made if the sugar had been delivered to them. They had a verdict and judgment, and appealed in order to obtain greater damages.

The defendant complains also, of the judgment, and prays that it may be reversed, and that judgment be given in his favor.

Our attention is first drawn to exceptions taken to the charge of the judge. It is only necessary to consider that which relates to the part of the charge instructing the jury to inquire, whether the defendant "made the sale on condition, or in the belief that his agents had not made it then, nor should have made it before they heard from him; and whether the person he contracted with so understood it; that if both these inquiries were answered in the affirmative, the contract was made under an implied or tacit suspensive condition, and the plaintiffs were not entitled to recover."

Where in a contract certain facts are expressly stated, all the consequences necessarily resulting from them are implied and enter into the contract.

It does not appear to us that the judge erred. When in a contract certain facts are expressly stated, all the consequences necessarily resulting from them are implied. It is stated in this contract, that the commission merchants had been directed to sell the defendant's crop. One of the consequences necessarily resulting from this fact was, that the crop might have been sold at the time the contract was made, or after and before the defendant's commission merchants could hear from him. In either of which cases the defendant would have been bound to deliver the crop to the vendee of his agents in New-Orleans, and could not honestly deliver it to the plaintiffs. The contract, therefore, was made under an implied or tacit suspensive condition, to wit: that no sale had been made by the defendant's agents, which would prevent the delivery of the crop to the plaintiffs. Paley says, "whatever in a contract would have clearly been assented to by both parties, if it had been mentioned at the time, makes part of it." If the defendant, therefore, had mentioned, that if the crop was sold in New-Orleans, the plaintiffs could not demand a delivery of it, they certainly would have assented to this modification of their contract. The testimony establishes the fact, that the defendant distinctly informed the plaintiffs of the orders he had given to his agents, in New-Orleans, for the sale of his sugar crop; and of the probability that a sale had been or

Where a planter sells his sugar crop on his plantation for a certain price, and at the same time apprises the buyer that his agents in New Orleans have authority and directions to sell it, the contract of sale will be considered as made under an implied or tacit suspensive condition, and the seller is only bound to comply in case his agents have not sold in the meantime.

Whatever in a contract would have been clearly assented to by both parties, if it had been mentioned at the time, makes part of it.

WESTERN DIST. *Sept.* 1837.

SMITH ET AL. *vs.* VANHILLE ET AL.

might be effected by them. From this view of the case, we conclude, that the plaintiffs are not entitled to recover.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be annulled, avoided and reversed; the verdict set aside, and that there be judgment for the defendant with costs in both courts.

SMITH ET AL. *vs.* VANHILLE ET AL.

APPEAL FROM THE COURT OF THE FIFTH JUDICIAL DISTRICT, FOR THE PARISH OF ST. LANDRY, THE JUDGE THEREOF PRESIDING.

When the appellee has obtained the dismissal of the appeal without a decision of the case upon the merits, the appellant still has the right of again appealing, and having the judgment of the inferior court reviewed, if he claims it within the year.

This case came up on a second appeal. It was dismissed at the last term of this court, on the ground of the insufficiency of the appeal bond. See 10 *Louisiana Reports*, 252.

The judgment appealed from was rendered the 30th May, 1836, and the present appeal was granted the 13th May, 1837.

A motion was filed the first day of the court, by the counsel for the defendants and appellees, to dismiss the appeal, because two appeals should be taken in the same case.

This is an action instituted by the heirs and legal representatives of Charles Smith, deceased, to recover from B. Vanhille and O. Guidry, syndics of the creditors of Louis Guidry, the sum of three thousand six hundred and thirty-five dollars, which was the price of certain property, pur-

chased by the insolvent, at the probate sale of Charles Smith's estate, in 1821, and which the plaintiffs allege has never been paid.

The defendants admitted their syndicship, together with one Luke Lesassier, and the latter being an attorney at law, was entrusted with and attended to the principal part of the business. But that they have caused a final tableau of settlement and distribution to be made, in which they have accounted for all the property and funds of the insolvent, and on which the plaintiffs claim is placed, *allowed and paid in full;* and a judgment of homolgation pronounced, which they now plead as *rem judicatem.*

The tableau was produced in evidence, and fully supported the averments of the defendants.

There was judgment for the defendants, and the plaintiffs appealed.

Lewis and *Bowen*, for the defendants and appellees, contended: 1st. That the appeal should be dismissed, because the same suit was before the court at its last term, on an appeal, and was dismissed. The law does not allow two appeals in the same case, and by the same party. *Code of Practice*, 564–5, 570.

2. The dismissal of the former appeal in this suit, was equivalent to an affirmance of the judgment appealed from. It became irrevocable and no subsequent appeal can be taken. *Code of Practice*, 588–9–90–94.

3. The appellant may withdraw his appeal before the appellee is cited, on motion to the lower court; and in that case he may renew it, which is the only instance specified. But after citation it cannot be withdrawn, or renewed. *Code of Practice*, 594–5, 901.

4. The appellants have not taken the steps required by law to renew their appeal, even if the right be conceded; and the present suit is not in such a situation as to authorize a renewal of the appeal, which was at an end by the judgment of dismissal.

5. The present appeal was granted by the judge of the sixth judicial district, which shows that the appellants have

WESTERN DIST. *Sept.* 1837.

SMITH ET AL. vs. VANHILLE ET AL.

attempted to renew their former appeal, without first having obtained leave of the court of the fifth district, in which the cause was tried and judgment rendered. Leave from the judge who decided the cause, should have been first obtained, to allow the appellants to withdraw their former appeal.

Simon, for the appellants, argued the question in support of the second appeal, for the original counsel who was absent.

1. The appellees contend, that two appeals cannot be taken successively in the same case. The appeal was dismissed in this case at the last term, on account of the insufficiency of the appeal bond; had it been sufficient the appeal would have been suspensive. *Code of Practice*, 578.

2. If the appellants lost the benefit of their appeal without a decision on the merits, by dismissing it, how can they be deprived of the right of appealing again within the year? The right of appeal is absolute during the year, when the case has never been decided on the merits, or the appeal abandoned. *Code of Practice*, 593.

3. At the last term the appeal was not withdrawn but simply dismissed, as if it had never been taken. The article 594, of the Code of Practice, is certainly not applicable. See *Code of Practice*, 901.

Martin, J., delivered the opinion of the court.

The question whether a new appeal may be resorted to, when the appellee has obtained the dismissal of the former one, is now, for the first time, presented for our decision.

The right of appeal is constitutional, and it is neither our duty nor inclination to impede or obstruct its exercise. In the courts of the first instance, the dismissal of a suit, even by the plaintiff, is not a bar to a new one for the same cause of action. Reasoning by analogy, the conclusions should, perhaps, be the same in appellate courts. The Code of Practice, however, prohibits a second appeal when the appellant, by his own act, abandons the first one. *Code of Practice*, 594.

There is an apparent good reason for this provision. By dismissing a suit in a court of the first instance, the plaintiff obtains the faculty of presenting his claim in a more advantageous light, and of offering evidence which it is not, or may not, be in his power to produce when his case is called for trial. It is not so on an appeal; the dismissal of which does not authorize any amendment of the pleadings, or the introduction of new evidence.

If the appellant has neglected to give a sufficient bond, or omitted any formality required by law, the appellee has a right to demand the dismissal of the appeal. This, however, he is not *required* to do unless he chooses; and it is for him to consider whether his interest be best promoted by proceeding in the appeal, or demanding its dismissal. In the latter case, he subjects his adversary to delay and costs. But we know of no text or principle of law which authorizes us to say that the appellant looses the right of having the judgment of the inferior court reviewed, if he claims it within the year. The appeal is, therefore, maintained.

When the appellee has obtained the dismissal of the appeal, without a decision of the case upon the merits, the appellant still has the right of again appealing, and having the judgment of the inferior court reviewed, if he claims it within the year.

On the merits, the appellants, who are syndics of an insolvent estate, had filed a tableau of distribution, showing that the estate surrendered into their hands, had been legally and fully administered; the claims of the plaintiffs were placed thereon, and the tableau showed that every part of the property of the insolvent which was applicable, had been applied to the extinguishment of their debt, whereby the syndics were entitled to their discharge.

The advertisements required by law were published, and judgment of homologation of the tableau and discharge of the defendants and appellees was pronounced, and has become *res judicata*.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

WESTERN DIST.
Sept. 1837.

O'DONOGAN
vs.
KNOX.

O'DONOGAN *vs.* KNOX.

APPEAL FROM THE COURT OF THE FIFTH JUDICIAL DISTRICT FOR THE PARISH OF ST. LANDRY, THE JUDGE OF THE DISTRICT PRESIDING.

In an action of revendication by an heir at law, demanding the property of a succession, which is in the hands of the instituted heir, who claims and holds it under the will, the *District* and not the Probate Court, is the proper tribunal in which the suit must be brought.

Where the District Court has jurisdiction of the subject matter, and a will is set up as the basis of title, and its validity is attacked, the court will decide on its validity and legal effect, as in any other case of title.

This is an action by an heir at law, claiming a share of the succession of her deceased sister, who was the wife of the defendant, who holds possession of it under a will, as instituted heir and universal legatee.

The plaintiff alleges she is the sister and heir at law of Eleanor O'Donogan, deceased, and as such entitled to inherit one half of her succession. That it is now in the hands of the defendant, and consists of paraphernal effects, to the value of two thousand dollars, and one half of the community lately existing between the deceased and the defendant, worth fifty thousand dollars. That the defendant sets up a will of the deceased, made in 1829, by notarial act, as the basis of his title to the property of said succession, which will she expressly charges to be null and void, on account of vices of nullity in its execution, etc.

The plaintiff prays that she be recognized as heir at law of her deceased sister; that said will be declared null and void, and that she have judgment for the amount of her portion of her deceased sister's succession, which she owned at her death.

The defendant pleaded to the jurisdiction of the District Court, on the ground that the Court of Probates, for the parish of St. Landry, had exclusive jurisdiction of the matters and things set up in the petition.

Upon this plea and issue, the case was decided.

The district judge was of opinion, that as the will sought to be annulled, had been admitted to probate and ordered to be executed, the court had no jurisdiction, but that the Probate Court had exclusive jurisdiction of the case. There was judgment dismissing the case, from which the plaintiff appealed.

Swayzé and *Garland*, for the plaintiff.

1. It is contended that an action of nullity should have first been brought in the Probate Court, to set aside the judgment admitting the will to probate, before the plaintiff can get at the property. But a third party may avail himself of the nullity of a judgment when it forms the basis of an action against him. 3 *Louisiana Reports*, 242.

2. The order probating a will is not such a judgment as requires an action of nullity to be instituted to set it aside.

3. Any person interested in annulling a will, the execution of which has been ordered in the Court of Probates, may institute suit for that purpose in the District Court. 10 *Martin*, 1. 1 *Martin, N. S.* 577.

4. The plaintiff was no party to the judgment probating the will, and is not bound by it. When an executor presents his account, and obtains a discharge without notice to the heirs, he is liable to be again sued, without annulling the judgment discharging him. 2 *Louisiana Reports*, 147.

5. The Probate Court is without jurisdiction in a suit between two sets of heirs, relative to the succession in controversy. 2 *Louisiana Reports*, 23.

Lewis and *Bowen*, for the defendant.

Carleton, J., delivered the opinion of the court.

The petitoner avers, that Eleanor O'Donegan, wife of the defendant, died without descendants, but leaving a mother, and the petitioner, her sister, who are her only legal heirs. That the deceased brought into marriage property consisting of land, money and cattle, hogs, horses and furniture, all of

WESTERN DIST. *Sept.* 1837.

O'DONOGAN *vs.* KNOX.

the value of a thousand dollars; that during the marriage, she came to the possession of other property, amounting to the same sum; that no marriage contract existed between the parties; that all the other property in their possession at the death of Eleanor, consisted of acquests and gains, made during marriage, one half of which descended of right to her legal heirs. That such acquests and gains consisted of a tract of land near Opelousas, on which defendant now resides, of several houses and lots in the town of Opelousas, a large number of slaves, a stock of cattle, hogs, horses and sheep, a considerable sum of money, a quantity of household furniture, and divers other property, both movable and immovable, situated in the parish of St. Landry, and elsewhere, altogether of the value of fifty thousand dollars; also, debts due from different persons, amounting to the further sum of ten thousand dollars; one moiety of all of which, after deducting the paraphernal property of said Eleanor, belonged to her at the time of her death.

The petitioner further sets out, that the defendant has taken possession of the whole of the above property, claiming his wife's portion, as her heir, under the last will and testament, which the petitioner alleges to be null and void, for the following reasons:

1. Because it was not dictated by said Eleanor to James Ray, pretending to act as a notary public, in the presence of the subscribing witnesses, nor was it written in presence of said Eleanor and the witnesses.

2. Because it does not appear that it was dictated by said Eleanor to said Ray, and written by him as dictated.

3. Because it is not dated at any particular place.

4. Because said Ray, who wrote the will, was not a notary public at the date thereof.

5. Because if said Ray were a notary public, he was not such for the parish of St. Landry, or any other parish in the state.

6. Because it is not set forth in said will, that all the requisite formalities were observed, without interruption, at one time, and without having turned aside to other acts.

7. Because it is not stated that the witnesses who signed the will were domiciliated in the parish of St. Landry, or any other parish in the state.

8. Because it is not stated that said Ray read the will to said Eleanor in the presence of the witnesses, or otherwise.

9. Because said will is deficient in all the forms required by law to make a legal and valid testament.

The petitioner concludes with a prayer that she be recognized as one of the heirs of said Eleanor ; that said last will and testament be declared null and void ; that she have judgment for one fourth of the property held in community if it exist, in the possession of defendant ; otherwise for the sum of fifteen thousand dollars, the value of such fourth part ; that an inventory be made, and a partition take place after judgment in her favor, and that she have relief generally.

The defendant having died before issue joined, his administrator filed for answer " that the court has no jurisdiction of this cause, but that the Court of Probates of the parish of St. Landry, has exclusive jurisdiction of the matters and things set up in the plaintiff's petition," and prays that the suit be dismissed.

On the trial upon this plea the court decreed as follows : " In this case it appearing to the court, that the will sought to be set aside by the plaintiff, had been admitted to probate, and ordered to be executed by the Court of Probates of the parish of St. Landry ; and this court being of opinion that it has no jurisdiction of this cause, it is therefore ordered, adjudged and decreed, that this suit be dismissed, that there be judgment against the plaintiff for the costs of this suit to be taxed."

From this judgment the plaintiff appealed.

We are aware of the difficulties attendant on this question of jurisdiction, and have not formed an opinion without much hesitation.

The plaintiff sets up a claim under the law of inheritance, to lands, slaves, and a variety of movable property ; that

WESTERN DIST. *Sept.* 1837.

O'DONOGAN *vs.* KNOX.

these are proper subjects for the exercise of the jurisdiction of District Courts, cannot be doubted.

But the petitioner proceeds further, and alleges the nullity of the will, which constitutes the very title under which the defendant holds the property in controversy. Before what court then must the validity of this will be tested?

By the law defining the jurisdiction of the Courts of Probate, it is declared:

That they shall have exclusive power "to open and receive the proof of last wills and testaments, and to order the execution and recording them.

"To decide on claims for money which are brought against successions administered by curators, testamentary executors or administrators of successions, and to establish the order of privileges and mode of payment.

"All debts in money which are due from successions administered by curators appointed by courts, and by testamentary executors, shall be liquidated, and their payment enforced by the Court of Probates of the place where the succession was opened.

"The case is different with respect to the action of revendication, and other real actions which shall be instituted against such estates; they may be brought before the ordinary tribunals."

The French text is still more explicit: "*elles sont du ressort des tribunaux ordinaires.*" *Code of Practice, articles* 924, 983.

In an action of revendication by an heir at law, demanding the property of a succession, which is in the hands of the instituted heir, who claims and holds it under the will, the *District* and not the Probate Court, is the proper tribunal in which the suit must be brought.

It appears then that the jurisdiction of the Courts of Probate, is limited to claims against successions *for money*, and that all claims for real property appertain to the ordinary tribunals, *and are denied to Courts of Probate.* The plaintiff in this case was, therefore, compelled, in suing for the property of the succession, to seek redress in the District Court, and whether she attacked the will, or the defendant set it up as his title to the property, the court having cognizance of the subject, must of necessity examine into its legal effect.

And although the will may have been admitted to probate, and an order given for its execution, yet these are only pre-

Where the District Court has jurisdiction of the subject matter, and a will is set up as the basis of title, and its validity is attacked, the court will decide on its validity and legal effect, as in any other case of title.

liminary proceedings necessary for the administration of the estate, and not a judgment binding on those who are not parties to them. When, therefore, in an action of revendication, a testament with probate becomes a subject of controversy, it will surely not be contended that a court of ordinary jurisdiction, having cognizance of the principal matter, shall suspend its proceedings until another court of limited powers shall pronounce upon the subject ; for, in that case the ordinary courts would submit to another tribunal, the decision of the main question in the cause, without right of trial by jury, and would have little else to do than to comply with its decrees. Whereas, if the ordinary courts should examine into the validity of testaments, drawn in controversy before them, they will do no more than we have often said a court of limited jurisdiction may do, even in relation to a question it could not directly entertain.

In the case of M'Caleb *vs.* M'Caleb, in 8 Louisiana Reports, we recognized the right of the Probate Court to inquire collaterally into the character of certain alienations of real estate ; and in one of them, whether contracts purporting to be sales, were in truth intended as donations. Such an inquiry became necessary in order to ascertain in what proportions the remaining property was to be distributed, which was the main question for its decision.

Nor does this opinion necessarily conflict with the decision of the Court, in the case of Lewis's Heirs *vs.* His Executors et al., 5 Louisiana Reports, 387, cited by defendants counsel. There the whole property of the succession was in the hands of the executor, the officer of the court whose functions had not expired. In the case before us, the will was admitted to probate, on the 26th May, 1831, and William G. Knox, the defendant and testamentary heir, confirmed as executor on the 27th of same month and year. In May, 1832, his functions as executor had expired, the probate of the will had taken effect, and the will itself executed by his coming as heir into the possession of the estate under it, long before the institution of this suit, in November, 1833.

WESTERN DIST. *Sept.* 1837.

TRAHAN'S HEIRS *vs.* ARDOUIN'S HEIRS.

We think the District Court erred in refusing to entertain jurisdiction of the cause.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be reversed, and that this cause be remanded with instructions to the court to proceed therein, according to law, and the costs to be paid by appellee.

TRAHAN'S HEIRS *vs.* ARDOUIN'S HEIRS.

APPEAL FROM THE COURT OF THE FIFTH JUDICIAL DISTRICT FOR THE PARISH OF ST. MARTIN, THE JUDGE OF THE DISTRICT PRESIDING.

The district courts have jurisdiction of cases, in which the validity of a will is contested, in suits between different sets of heirs claiming a succession.

This is an action by the heirs at law of Marie Marguerite Trahan, deceased, to recover from the defendants, her succession, which the latter hold and claim under a will.

The plaintiffs allege, that they are the nearest collateral relations of the deceased, who died without leaving ascendants or descendants, and are entitled by law, to inherit her succession; but that the children and heirs of Etienne Ardouin, deceased, to whom the said Marie Marguerite Trahan had been married, claim possession under and by virtue of a will, which she was induced to make in her last moments, through the conspiracy of said persons, and in which she instituted them her heirs. The plaintiffs further allege, that the said will is null and void for want of the various formalities required by law to make a valid will; and especially in this, that it requires five witnesses instead of *three*, being made in the country where more witnesses could have been procured, and one of the witnesses not residing in

the place where the will was passed. The plaintiffs pray that the defendants be cited, and condemned to deliver to them the succession of the decedent, including the notes and obligations taken for the property sold by the probate judge, and not yet due; and that the defendants be compelled to render an account of the community existing between the said Marie Marguerite and her late husband, and pay over to them all the funds belonging to her succession, which may have passed into their hands.

The defendants pleaded a general denial, and aver that they are entitled to the succession of Marie Marguerite Trahan, in virtue of a nuncupative will, under private signature, executed by her the 16th April, 1829, and duly admitted to probate, in which they have been instituted her heirs and universal legatees, and as such have taken possession of her succession, and disposed of the same through a testamentary executor duly appointed; that said will is valid and has been made with all the formalities of law; that it was made in the country and three witnesses were all that could be procured at the time, the testatrix being in the last extremity of illness.

The defendants deny all fraud and conspiracy, and aver that if the will should be declared null that they be reimbursed their expenses of administration, and that they retain all the property of their deceased father, both his separate and the community property; but they pray to be maintained in their right and possession of all the property of said Marie Marguerite, and that their will be declared good and valid.

Upon these pleadings and issues the case was tried by a jury.

The evidence showed that more than three witnesses might have been obtained. There were several other persons about the house at the time, who were competent witnesses.

On the trial, to repel the charge of conspiracy and fraud in obtaining this will, the defendants offered a nuncupative will, passed before a notary, in 1826, in which the testatrix

WESTERN DIST. *Sept.* 1837.

TRAHAN'S HEIRS *vs.* ARDOUIN'S HEIRS.

gave her whole property to her husband, then living, and made him her universal legatee, and instituted heir. The reading of this will was objected to and excluded by the court, which decision was excepted to.

This will became void by the death of the husband, before the testatrix.

The jury returned a verdict annulling the will and giving the property of the succession to the plaintiffs.

Judgment was rendered confirming the verdict, and referring the case to the parish judge, as auditor, to state an account of the succession between the parties. The defendants appealed.

Lewis, for the plaintiffs.

Simon, for defendants.

1. This is not an action of revendication that must be brought in the District Court. It is a suit to annul a will, and the principal question is, has the District Court jurisdiction? The validity of the will and decree of the Probate Court, ordering it to be executed, are put directly at issue, so that it is really an action of nullity against the decree or judgment of the Probate Court. The District Court is clearly without jurisdiction. *Lewis* vs. *Lewis's Executors*, 5 *Louisiana Reports*, 387. 8 *Martin, N. S.*, 518. 1 *Louisiana Reports*, 19.

2. In this case the District Court is without jurisdiction, *ratione materia*, and it is not necessary to plead specially to the jurisdiction. The court can and should *ex officio* dismiss the action.

3. The case of *Sharp* vs. *Knox*, 2 *Louisiana Reports*, 26, is not like this. That was an action of revendication, to recover property in the hands of the pretended heir, and the will under which he claimed had not been admitted to probate.

Carleton, J., delivered the opinion of the court.

The petitioners allege, that they are the collateral relations, and heirs at law, of Marie M. Trahan, who died leaving

considerable property, both real and personal, held in community with her husband, Etienne Ardouin ; that the heirs of said Ardouin by a former marriage, claim and took possession of the portion of the estate to which said Marie was entitled, in virtue of a nuncupative will under private signature, dated in April, 1829, which the petitioners allege to be null and void, for the following reasons set out in their petition, viz : that it was never executed or consented to by the testatrix ; that she never presented it to the witnesses as is pretended ; that she never dictated it to the person who wrote it ; that she never declared it to be her last will and testament, nor declared that she had caused it to be written out of her presence ; that she never signed the same or made her ordinary mark thereto ; and finally, that there are but three subscribing witnesses when five could have been easily procured.

The defendants answer by general denial, and aver that they are the testamentary heirs and universal legatees of said Marie, and have taken possession of her estate as her testamentary heirs, under said will, and disposed of the same ; that the will was made in the country where three witnesses only could be obtained, which they allege to be sufficient in law.

The defendants further insist, that if the will be declared void, they are entitled to be reimbursed the expenses incurred, an account of which they exhibit ; that they are moreover entitled to the amount of property brought by said Ardouin into marriage, as also to one half of the community of acquests and gains, all of which, they aver, to be one thousand dollars more than is stated in the petition, and pray for the liquidation of the same in case the will be void.

The cause was submitted to a jury who found a verdict for the plaintiffs.

After an ineffectual effort to obtain a new trial on the part of defendants, the court pronounced its judgment, and they appealed.

Our attention is first drawn to a question of jurisdiction raised in argument by defendants' counsel, who insists that

WESTERN DIST. *Sept.* 1837.

BROUSSARD *vs.* ETIE.

The district courts have jurisdiction of cases, in which the validity of a will is contested, in suits between different sets of heirs claiming a succession.

the Court of Probates, and not the District Court, is the only tribunal before which the validity of the will can be tested. This point has just been settled in the case of Marie O'Donogan, wife of James Bonner *vs.* William G. Knox, *ante*, where we determined that the District Courts had jurisdiction in such cases.

At the trial of the cause, defendants' counsel took a bill of exceptions to the opinion of the court, who refused to permit a former will of the testatrix by public act, to be read in evidence, to show that it was always her intention to leave her property to the family of her husband. This will was dated in 1826, and became void by the death of her husband, the instituted heir, who died before the testatrix.

We think the court did not err. The question was not, what was the intention of the testatrix, but whether the will containing that intention was executed in due form of law.

We have looked carefully through the testimony in the record, and think the plaintiffs have made out their case. The controversy turned mainly upon matters of fact, of which the jury were the best judges, and we see no reason to be dissatisfied with the judgment of the court.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

BROUSSARD *vs.* ETIE.

APPEAL FROM THE COURT OF THE FIFTH JUDICIAL DISTRICT, THE JUDGE OF THE SIXTH PRESIDING.

The proprietor of an adjacent estate cannot claim the *right of way* over his neighbor's land, by prescription, because this right from its nature is discontinuous or interrupted. It needs the act of man to be exercised. Interrupted servitudes can be established only by a title.

A proprietor whose estate is surrounded by his neighbor, may claim the right of passage over the land of the latter; but this right he must acquire by obtaining it from the owner of the estate who is to give it, or contradictorily with him, designating the place on which it is to be exercised, and the amount of indemnification.

The owner of an estate, claiming a servitude on, or in exercising a right of passage *over* the uninclosed lands of his neighbor, to the public road, does not thereby render himself liable to a suit, and give such a claim to indemnification to the other, as if not exercised within thirty years, will be barred by prescription.

This is an action for the *right of way*, or passage over the defendant's land.

The plaintiff alleges he is the owner of a plantation in the parish of St. Martin, fronting on a small bayou or coulée, opposite to a tract of land belonging to the defendant; that from the situation of their two plantations, he has *no way* to reach the public road, but by passing over the land of the defendant; and that for more than thirty years previous to instituting this suit, he and those under whom he claims have been in the habit of passing through the land now occupied by the defendant, and of crossing the bayou opposite his land, and of passing near his house, so as to reach the public road in the shortest route; that in consequence of the uninterrupted use of said passage for more than thirty years, it has become *a legal servitude*, attached to his (petitioner's) land.

He further alleges, that the defendant, regardless of the right acquired by the petitioner, and contrary to law, has stopped the said passage, by putting a fence across it, so as to deprive him of any further use thereof, to his damage, five hundred dollars. He further alleges, that he has acquired the right to the use of this passage by the longest prescription, and that the defendant is now barred by prescription from setting up any claim for indemnity.

He prays that the defendant be ordered to open said passage, and take away the fence which he has put across it, and that he be quieted in the use and enjoyment of it, as

WESTERN DIST. *Sept.* 1837.

BROUSSARD *vs.* ETIE.

a servitude attached to his land, and that in default of the defendant complying with this order, then a writ of *distringas* to issue, to compel a compliance.

The defendant pleaded a general denial, and denies that the plaintiff's land is so situated as to entitle him to a right of way over his land; that if it should be accorded to the plaintiff, he avers it should be over that part of it, where it will be least injurious to him; as it now is, it passes through the middle of his plantation, and near his dwelling house; and he further avers, if such passage or right of way is accorded, that he is entitled to an indemnity proportioned to the damages it will occasion him, which are at least five hundred dollars.

The defendant avers that he purchased the land in question from Isaac L. Baker, and cites his heirs at law in warranty.

The administrator of Baker pleaded a general denial to the plaintiff's petition, and denied his liability in warranty; but if liability in the latter case, he calls on Eugene Carlin, from whom he purchased, to defend his title.

Carlin appeared, and denied the rights and claims set up in the petition, and also denied his liability in warranty to Baker's estate.

Upon these pleadings and issues the case proceeded to trial.

The testimony and diagram show that the plaintiff's and defendant's plantations are situated opposite to each other, a small bayou called *Petit Anse* running between them; that there is a crossing of said bayou from plaintiff's over to defendant's plantation, which has existed for forty years; and that the residents on plaintiff's land had been in the constant habit of passing over about eight or ten arpents of defendant's land, to reach the public road in the shortest route, and to avoid a small *coulée* or marshy drain; that the land of the plaintiff is situated back from the public road, and surrounded by marshes and trembling prairies, so as to render it necessary to cross the bayou over on the defendant's land, and reach the public road. This bayou can be crossed above defendant's land, with some difficulty; but then the *coulée* intervened, and it was necessary to cross it, which

could not be done in rainy weather, as it became, in the language of the witness, a *grand* bayou.

The defendant had, within a few years, made a fence across the passage or road, and prevented the use of it.

Upon the whole evidence of the case, the district judge was of opinion the plaintiff had a right to recover, as he had alleged, and that he had clearly established a legal servitude.

Judgment was rendered, quieting the plaintiff, in the enjoyment of his right of passage by him claimed; and that the defendant should, within thirty days, pull down his fence and open the passage, and that in default thereof, a *distringas* should issue, etc.

From this judgment the defendant appealed.

Simon, for the plaintiff.

1. The plaintiff claims a right of passage by virtue of the law and not in consequence of title. It is a legal servitude he claims, and which the law gives to him; because the evidence shows the situation of his land, and establishes clearly his right to demand a passage over his neighbor's estate. *Louisiana Code*, 670, 695, 698, 717–18. *Nouveau Desgodets, vol.* 1, *page* 236.

2. The right of passage here claimed, has been enjoyed for more than thirty years, and no indemnity has ever been demanded. The defendant's right to indemnification is gone; it is now too late to set up this right, and claim it of the plaintiff. His right to claim an indemnity is prescribed, and the right of passage continues, and the way must remain open to the plaintiff's use. *Louisiana Code*, 704. *Nouveau Desgodets, vol.* 1, *page* 238. *Favard, verbo Servitudes Legales. Sirey, vol.* 22, *part* 1, *page* 154.

Bowen, for the defendant, contended, that the plaintiff could not, under the circumstances of this case, demand the *right of way* over the defendant's land, as a servitude. He claims it solely on the ground of prescriptive right; but it would be a violation of law, if the court were to decree it to him without any indemnification of the defendant.

WESTERN DIST. *Sept.* 1837.

BROUSSARD *vs.* ETIE.

2. The right of way is an interrupted servitude, which first requires the *act* of man in order to be exercised. Interrupted servitudes consist of the rights of passage, drawing water, and the like. *Louisiana Code*, 723. *Civil Code of* 1808, *page* 138, *article* 51. *Partida*, 3, *title* 30, *law* 15. *Merlin's Reportoire, title Servitude, section* 8.

3. By the laws of Louisiana, *continuous* and apparent servitudes may be acquired by prescription; yet continuous *non-apparent* servitudes, and uninterrupted, can be acquired only by a title immemorial. Possession itself is not sufficient to establish them. *Louisiana Code, article* 761–2. *Civil Code, page* 138, *article* 53–4.

4. But, it is contended, prescription in this case, began to run under the Spanish law, which must govern it. Under this law the same distinction subsists between continuous and interrupted servitudes, as under the Louisiana Code. *Partida* 3, *title* 31, *law* 15.

5. The servitude now claimed, according to the testimony, only commenced about thirty-six or forty years ago. According to the Spanish law, the possessor and those under whom he holds, must have used the servitude, or exercised it so long that the "memory of man runneth not to the contrary."

6. It will be seen here, that the right of way is not even claimed by immemorial usage, but by the prescription of thirty years. Merlin repels, in the strongest manner, the idea that a prescriptive right to an interrupted servitude can be completed, so as to give a title under a law which declares such servitudes *not prescriptible. Merlin's Reportoire, mot Prescription, sections* 1 *and* 3, *Nos.* 8 *and* 9.

7. To entitle one to the right of way, he must have no way to the public road, but through the lands of his neighbor. He has no right, even then, to exact the right of passage from which of his neighbors he pleases; but it must be taken from the shortest distance, and fixed at the place the least injurious to the person on whose estate it is granted. *La. Code*, 695–6. *Civil Code*, 1808, *page* 136, *articles* 46, 47.

8. The defendant is certainly entitled to indemnity for this right of way from somebody, and if not from the plaintiff, then from his (defendant's) vendors in warranty.

9. As to the amount of indemnity, it is fixed by the witnesses at five hundred dollars, taking into account the inconvenience and loss of the defendant; and this is the proper standard. Toullier says, the indemnity is to be regulated by the damage which the passage may occasion to him who is forced to give it, and not by the advantages which he to whom it is granted may be able to derive from it. 3 *Toullier, page* 402, 403, *No.* 531.

Martin, J., delivered the opinion of the court.

The plaintiff states, that his plantation is so surrounded by marshes, trembling prairies, and the lands of the defendant, that he cannot have access to the public road without traversing a part of the land of the latter ; that he and those under whom he holds, have, for more than thirty years before the institution of this suit, been in the habit of traversing and passing over said land, in order to reach the public road, by crossing *a coulée* at a certain place, a short distance from defendant's house, and which is the nighest way to the road ; hence the passage across defendant's land has become a legal servitude due to his estate ; that the defendant has stopped up said passage, by putting a fence across it. The plaintiff further states, that, in consequence of the length of time he has occupied and used this passage, he has acquired the right to it by prescription, and that the defendant is barred by prescription, from setting up any claim to indemnification.

The defendant pleaded the general issue ; and that if the plaintiff is entitled to a right of way that it be accorded to him, over that part of his land the least inconvenient and injurious to him, and not as he claims it ; and not without an indemnification.

There was judgment for the plaintiff, and the defendant appealed.

The proprietor of an adjacent estate cannot claim the *right of way over* his neighbor's land

The plaintiff's claim to a legal right of way by prescription cannot be admitted, because this right from its nature, is discontinuous or interrupted. The code says " *interrupted* servitudes are such as need the act of man to be exercised. Such are the rights of *passage*, of drawing water, pasturage, or the like." *Louisiana Code, article* 723.

WESTERN DIST.
Sept. 1837.

BROUSSARD
vs.
ETIE.

"*Interrupted servitudes*, whether apparent or not, can be established *only by a title*." *Ibid.*, 762.

The plaintiff has, indeed, shown, that from the situation of *his estate* he "may claim the right of passage on *that* of the defendant; but he has not shown that he has this right on any determinate part of it. This right he must acquire by obtaining from the defendant, or contradictorily with him from the court, a designation of the place on which it is to be exercised. He has not done this, and he cannot, therefore, complain of the erection of a fence by the defendant, on any part of his estate. The code expressly says, that a *passage* shall be fixed in the place the least injurious to the person, on whose estate it is granted. *Louisiana Code, article* 696, *and the latter clause.* This provision seems to give to the defendant, such place as is least injurious to himself, for he is to be considered the best judge.

by prescription, because this right from its nature is discontinuous or interrupted. It needs the act of man to be exercised. Interrupted servitudes can be established only by a title.

A proprietor whose estate is surrounded by his neighbor, may claim the right of passage over the land of the latter; but this right he must acquire by obtaining it from the owner of the estate who is to give it, or contradictorily with him, designating the place on which it is to be exercised, and the amount of indemnification.

The pleadings in this case, seem to authorize us to consider the suit as a claim for the right of passage, but the defendant has objected to the place on which this right of passage is demanded, and urged his claim to indemnification. The plaintiff has replied, that although the right of passage may not be acquired by prescription, the claim to indemnification is barred by it, because he and those under whom he claims, by exercising the right of passage for upwards of thirty years, have given to the defendant, and those under whom he claims, a right to indemnification, which they have not claimed.

The owner of an estate, claiming a servitude on, or in exercising a right of passage *over* the uninclosed lands of his neighbor, to the public road, does not thereby render himself liable to a suit, and give such a claim to indemnification to the other, as if not exercised within thirty years, will be barred by prescription.

It does not appear to us that by passing over the defendant's land, the owners of the estate for which the servitude is claimed, rendered themselves obnoxious to the suit, or claim of the owners of the estate on which it is demanded, because it is not shown that the land was inclosed. In this country any one may hunt on the lands of others until he be forbidden, without being liable to an action; *a fortiori* may he pass over it. *Louisiana Code, article* 3378. As the claim to the right of passage is now for the first time made, the defendant is in time to urge his claim to indemnification. In order to give to the latter the opportunity of pointing out the

place least injurious to him, for the exercise of the plaintiff's right; and as the indemnification to which the defendant may be entitled, may vary from that which would be due if the passage was taken where the plaintiff claims it, justice requires that the case should be remanded.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be annulled, avoided and reversed, and the case remanded for further proceedings according to law; the plaintiff and appellee paying the costs of the appeal.

FOSTER'S HEIRS *vs.* FOSTER'S ADMINISTRATRIX ET AL.

APPEAL FROM THE COURT OF THE FIFTH JUDICIAL DISTRICT, FOR THE PARISH OF ST. MARY, THE JUDGE THEREOF PRESIDING.

Where sales of certain slaves are made by public act, in due form of law, having the appearance of verity and good faith on the face of them, and the vendee afterwards mortgages these slaves to a creditor, who is ignorant of the fraud practised by the vendee upon his vendor, in acquiring them, the mortgagee's right will not be affected by the fraud between the original parties.

A *bonâ fide* purchaser, ignorant of the nature of the sale to his vendor, cannot be affected by any fraud between the original parties: So, a mortgage being in the nature of an alienation, the mortgage creditor, who had no knowledge of the *fraud* between the mortgagor and his vendor, in acquiring the mortgaged property, will not be prejudiced by it.

This is an action of revendication and rescission of the sales of certain slaves, on account of fraud in the vendee.

The plaintiffs are the children of Thomas Foster, deceased, joined and assisted by their mother as tutrix, and her husband

WESTERN DIST. *Sept.* 1837.

FOSTER'S HEIRS vs. FOSTER'S ADMX. ET AL.

as co-tutor. They allege that Thomas Foster, a short time before his death, sold and conveyed to his brother, Levi Foster, eighteen or nineteen slaves, by notarial act bearing date the 5th and 13th May, 1830, which sales they expressly charge to be fraudulent, null and void, having been procured by fraud and circumvention on the part of Levi Foster from Thomas Foster, when the latter was, by habitual intoxication and extreme debility, incapable of managing his affairs, and without any real or *bonâ fide* consideration.

They further allege, that said sales and transfer of the slaves in question were made in fraud, and to defraud the widow of her rights to one half of the community, and the minor children of their rights in the inheritance of the community of acquests and gains.

They further state, that after the death of their ancestor, which happened soon after the passing of said sales in 1830, Levi Foster took possession of his papers, books, and all his remaining effects, without making an inventory, or ever accounting for, or explaining the affairs of Thomas Foster's succession; and that in 1831 he applied to the judge of probates, and had himself appointed tutor of the minor children of said Thomas Foster, all of which is contrary to law.

They further show that Levi Foster is dead, leaving a widow and four children, who is tutrix of the minor children, administratrix of his estate, and has taken into her possession the said slaves and other property.

The plaintiffs further allege, that said acts of sale ought to be annulled as fraudulent, because they are donations *inter vivos*, made gratuitously and without consideration; that they are illegal, being of immovables of the community of acquests and gains, and not made for the establishing of the children of Thomas Foster, but on the contrary, to deprive them of their inheritance as forced heirs; that they are null and void as acts of donation, not being made and accepted in the manner prescribed by law, but on the contrary, disguised in the form of onerous contracts; they are null for the portion to which the widow is entitled as a partner in the

community, even if valid as donations, and must be reduced to the disposable portion, both as respects her and the forced heirs.

They pray that the acts of sale be annulled, and declared fraudulent and void, and that said slaves be decreed their property, and delivered up accordingly.

The defendant denied all fraud, and averred that said sales are valid, being made *bonâ fide;* that the slaves in question belong to the succession of her deceased husband, which she administers; she avers that the plaintiffs, having succeeded to all the rights of Thomas Foster, are legally bound by his acts, and they cannot attack the sales as fraudulent, or allege and prove fraud any more than Thomas Foster could, were he living. She prays that the plaintiffs' demand be rejected.

Hillyer and Robbins intervened, and claimed to be mortgage creditors of Levi Foster, having a mortgage on some of the slaves in question, executed after the sales from Thomas Foster to his brother.

They allege, that their rights will be materially affected by the plaintiffs' demand, and ask to join the defendant in supporting said sales. They deny all fraud on the part of Levi Foster, and pray that the plaintiffs' claim be rejected, and for general relief.

The plaintiffs, in answer to the petition of intervention, aver that the mortgage cannot affect the property in question, because Levi Foster could not legally mortgage property which did not belong to him; and further, that the debt attempted to be secured by this mortgage, was contracted by Wm. A. Seay & Co., long before the acts of sale were passed, and was not therefore a new obligation contracted on the faith of said sales.

Upon these pleadings and issues the case was tried by a jury.

The evidence showed, that in the spring of 1830, Levi Foster induced his brother, Thomas Foster, to leave his family in Mississippi, and come with his slaves to the parish of St. Mary, in Louisiana, where the former resided. Although not poor, Thomas Foster's affairs in Mississippi

WESTERN DIST. *Sept.* 1837.

FOSTER'S HEIRS *vs.* FOSTER'S ADMX. ET AL.

were in some disorder; but he left enough to pay his debts, and his creditors never followed him.

He was a man of intemperate habits, being in a state of continual intoxication, and his brother availing himself of his influence over him, persuading him that his creditors were pursuing him from Mississippi, it was necessary to conceal himself, and to convey his property, for the benefit of his children, to him, who was their uncle.

Under this influence the two acts of sale were made, which purport on their face to be for a valuable consideration. The first one, dated the 5th May, 1830, states the consideration to be a note for three thousand dollars, from Thomas to Levi Foster, purporting to be executed the 15th January, 1830. The other act declares the consideration to be two thousand five hundred dollars, payable in certain promissory notes and goods, and that they were *delivered.*

It was proved, that at the period of the date of the note of three thousand dollars, from Thomas to Levi Foster, the latter was in Louisiana, and the former in Mississippi, and could not have seen each other for more than a month after its date. In relation to the second sale, M'Intosh, a witness for the plaintiffs, states, that the notes mentioned as having been given in payment by L. Foster, were put into his hands, but proved to be on insolvent persons; and after keeping them some time, Levi Foster took one of them, which, he thought, might be of some value, and told him to destroy the rest, as being of no value, and to say nothing about it. The goods mentioned in this sale as being delivered, were proved to have been sent to Texas by Levi Foster himself, and sold on his account.

The parish judge who passed these sales, states in his testimony, that Levi Foster directed him to express at the foot of the act of sale, that the goods and notes were delivered to the vendor. The judge adds, that he suspected the fairness of the transaction at the time.

There was much testimony taken, and many circumstances detailed, proving the fraud on the part of the vendee, as alleged.

Upon all the evidence adduced, the jury returned a verdict for the plaintiffs, setting forth, that as Levi Foster acquired no title to the slaves in question, he could convey none to the mortgagees and intervenors. Judgment was rendered for the plaintiffs, annulling the sales, and decreeing the slaves to the plaintiffs, and rejecting the demand of the intervenors.

The defendant and intervenors both moved for a new trial, which being refused, the intervenors alone appealed.

Bowen and *Crow*, for the plaintiffs.

In this case the contract of sale between Thomas and Levi Foster, is null and void ; the consent of the vendor having been unfairly obtained through fraudulent means. *Louisiana Code, article* 1772, 1813, 1841. 1 *Martin, N. S.*, 451.

2. Contracts of sale so infected with fraud as these, are utterly void *ab initio*. No title is acquired under them by the fraudulent purchaser, and he cannot transmit any to his creditors, because the rights which the creditor acquires, cannot be greater than those of the debtor. 2 *Louisiana Reports*, 81. 8 *Martin, N. S.*, 336. *Dig. liv.* 50, *title* 17, *law* 54, 143, 171. *Partida* 7, 34, 12 and 13.

3. In fraudulent sales the vendee acquires no title, but only a naked possession, where the property is delivered. Fraud renders a sale void *ab initio*, which is not translative of property from the original vendor, who may still claim it as if it had never been sold. 2 *Louisiana Reports*, 516. 3 *Ibid*, 232. *D' Wolf* vs. *Butler*, 4 *Mason*, 289.

4. There is a difference between the case of *bonâ fide* purchasers, and the creditors of a fraudulent vendee. The former are made poorer by the payment of the price ; the latter pay out nothing, and in effect, secure a debt due them from one person, with the property of another.

5. The interpleaders in this case, were creditors of Levi Foster, before this sale, for goods sold to a firm of which he was a member. By taking a mortgage on these slaves they were placed in no worse condition, and might be in a much

WESTERN DIST. *Sept.* 1837.

FOSTER'S HEIRS *vs.* FOSTER'S ADMX. ET AL.

better situation; they are not, therefore, entitled to any exemption on account of this fraud.

6. Our insolvent laws protect the title of the purchaser, on the eve of insolvency, from whom a new consideration passes, but will disregard that of one who purchases on account of an antecedent debt.

Lewis, for the defendants.

Simon, for the intervenors.

The intervenors are mortgage creditors of Levi Foster, against whom fraud is alleged by the plaintiffs, to annul the sales of certain slaves made to him by Thomas Foster. This fraud cannot affect the intervenors, who are the *bonâ fide* creditors of Levi Foster, and who contracted with him in the full belief that he was the true owner of the slaves mortgaged.

2. Will the fraud that is supposed to have existed and been proven between the vendor and vendee, be sufficient to prevent the interpleaders from recovering the amount of their mortgage debt, and enforcing it against these slaves? It is believed these parties who are third persons, cannot be affected by any fraud between the original parties. *Louisiana Code*, 2236. 1 *Martin, N. S.*, 384. 8 *Ibid*, 342. 6 *Cranch*, 133.

3. The intervenors were strangers to any fraud between the original parties; had no knowledge of it, and contracted in good faith with the vendee. Suppose Thomas Foster, instead of selling the slaves, had merely consented to mortgage them to secure a debt due by Levi Foster, would not the mortgage have its effect? Here L. Foster was in possession of the slaves, and his title to them open and known to all. The circumstances of fraud and simulation cannot affect the rights of third parties acting in good faith. 6 *Cranch*, 133.

Carleton, J., delivered the opinion of the court.

This is an action brought by the wife and heirs of Thomas Foster, deceased, to set aside two acts of sale, one dated 5th

May, 1830, and the other the 13th of the same month and year, by which a number of slaves were sold by said Thomas Foster to Levi Foster, his brother. The petitioners aver, that the sales are null and void, having been made in fraud of their legal rights, and without consideration.

Levi Foster having died, the suit is instituted against his widow and heirs.

The defendants for answer, deny generally; repel the charge of fraud; plead the prescription of one year, and set up various other matters in defence, which it is not material to notice.

Soon after the petition was filed, Philo Hillyer and George Robbins, merchants, residing in New-York, intervened in the cause, alleging in their petition, that this action would materially affect their rights, inasmuch as they held a mortgage on several of the said slaves, as security for a debt of a considerable sum of money, due them from Levi Foster's succession; that the slaves were duly transferred to him by his brother Thomas; deny the existence of any fraud, as alleged, and pray that the plaintiffs' petition may be rejected, and for general relief.

The plaintiffs, in their answer to the petition of intervention aver, that the slaves were not the property of Levi Foster, and that he had no right, therefore, to mortgage them; that the debt for which the mortgage was given, was contracted in favor of one William Seay, long before the date at which the sales took place.

The cause was submitted to a jury, who found a verdict for the plaintiffs. An ineffectual effort having been made for a new trial, the court pronounced its judgment, annulling and setting aside the sales, both with respect to the interpleaders and defendants. The intervenors appealed.

The record is loaded with oral and documentary evidence, all tending to prove the fraudulent nature of the transaction between Thomas and Levi Foster. The jury and court were of opinion that the plaintiffs had made out their case as charged in the petition. The only question then, arising

WESTERN DIST. *Sept.* 1837.

FOSTER'S HEIRS *vs.* FOSTER'S ADMX. ET AL.

Where sales of certain slaves are made by public act, in due form of law, having the appearance of verity and good faith on the face of them, and the vendee afterwards mortgages these slaves to a creditor, who is ignorant of the fraud practised by the vendee upon his vendor, in acquiring them, the mortgagee's rights will not be affected by the fraud between the original parties.

A *bonâ fide* purchaser, ignorant of the nature of the sale to his vendor, cannot be affected by any fraud between the original parties: So, a mortgage being in the nature of an alienation, the mortgage creditor, who had no knowledge of the *fraud* between the mortgagor and his vendor in acquiring the mortgaged property, will not be prejudiced by it.

in the cause is, whether Hillyer and Robbins shall be prejudiced by the fraud between the original parties to the sales.

The first sale of the 5th May, 1830, was by act under private signature, but duly acknowledged and admitted of record in the office of a notary public the following day. The second, of the 13th of the same month, was by public act, in due form of law, and both of them set forth the payment and receipt of the prices for the slaves, and in every respect wear the appearance of verity and good faith.

It is not pretended, nor is there any testimony in the record showing that Hillyer and Robbins had any knowledge of the vices that tainted the transaction between the two Fosters. The slaves were delivered to the vendee, who retained them peaceably in his possession, and in December, 1830, seven months after the sales, mortgaged them to the intervenors in order to secure the payment of a debt, the existence of which is not denied. Had Levi Foster sold the slaves to a third person, ignorant of the nature of the sale from his brother, it cannot be doubted that the vendee's title would have been good. A mortgage is in the nature of an alienation, and the mortgage creditor who had no knowledge of the fraud, would be equally protected with the vendee. No principle is better established in law or moral justice, than that third persons acting in good faith, shall not be prejudiced by the frauds of others, in which they had no agency or concern.

It does, therefore, appear to us, that the mortgage executed by Levi Foster to Hillyer & Robbins, is valid in law, and affects the slaves therein mentioned, for the entire payment of their debt.

We think there is error in the decree of the court below.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court, so far as it relates to the intervenors, Hillyer & Robbins, be avoided and reversed, and that the plaintiffs and appellees pay the costs of appeal.

BROWNSON, ADMINISTRATOR, ETC. *vs.* BAKER'S CREDITORS.

APPEAL FROM THE COURT OF PROBATES FOR THE PARISH OF ST. MARTIN.

The promise to pay interest on a note, enters into the obligation of the contract, and constitutes as much a part of the debt as any portion of the principal sum, and continues to run until payment.

Payment into the hands of an administrator of the proceeds of the property of a succession, will not stop interest, until the money is paid over to the creditor.

The appointment of a curator to a succession, as a vacant estate, fixes conclusively the capacity in which he acted, although, in fact, the estate was not vacant, and the minor heirs were known. His responsibilities will be those attaching to the office of curator, and not those of a tutor, who should have been appointed.

These cases arose on the tableau of distribution of the estate of Isaac L. Baker, deceased, filed by John Brownson, Esq., the administrator. The estate was administered as an insolvent one. The heirs of James Keith, deceased, made opposition to the tableau, on the ground, that their debt against said estate, was evidenced by a promissory note of the deceased, drawing eight per cent. interest, per annum, *until payment*, and that the administrator *only allowed interest to be calculated to the death of Baker*, and refused to allow it until payment.

The opposition was disallowed, and the opponents appealed.

Jane Webb, the widow, and as tutrix of the minor heirs of Captain Alexander Sutherland, deceased, also made opposition to the tableau, on the ground that the heirs were placed thereon, as chirographery creditors, when they should have been recognized as having a legal mortgage on all the estate of said Baker.

The evidence and statement of facts show, that in 1821, Isaac L. Baker applied to the judge of probates for the parish of St. Mary, to be appointed curator of the vacant estate of Captain A. Sutherland, and was appointed; the succes-

WESTERN DIST. *Sept.* 1837.

BROWNSON, ADMR., ETC. *vs.* BAKER'S CREDS.

sion being styled both in the petition and appointment *a vacant one*, he took the oath and gave security as such curator, accordingly. The opposing creditor contends, that the appointment of Baker should have been made as contemplated by article 1092 of the Louisiana Code, and that the responsibilities of his succession are the same as if he had been appointed a tutor or curator *ad bona*, the heirs being absent and minors. The opposing creditor offered, in evidence, the testimony of Judge Wilkinson, the probate judge, who made the appointment, to show that at the time of the appointment, Baker stated that Captain Sutherland had minor children in New-York, who were his legal heirs; that he was administering the estate for their benefit, and that he considered the estate of Captain Sutherland, vacant, only in consequence of his heirs residing out of the state of Louisiana. This evidence was objected to as illegal and inadmissible.

The object of this opposition was to make Baker responsible as tutor of the minor heirs of Sutherland, under article 1092 of the code, and thereby raise a legal mortgage on his estate in their favor.

The opposition was overruled and the opponent appealed.

Bowen, for the opposition of Keith's heirs, contended, that interest continued to run on all debts in which it was stipulated, until final payment. He cited the following authorities. *Code of Practice*, 983, 989. 3 *Louisiana Reports*, 159. 9 *Ibid*, 17, 266.

Lewis, contra ; insisted, that interest on debts due by an insolvent estate, was only to be computed up to the time when they respectively became due, at the death of the debtor.

Simon, for the opposition of Jane Webb, stated, that Baker was appointed curator to the vacant estate of Sutherland, when before and at the time, both he and the judge of probates, knew that the minor children were living in New-York, so that in fact the estate could not be considered as vacant. *Louisiana Code*, 1088, 1090–1.

2. The proper and only course, was to appoint a tutor to the minor children, and that in fact, Baker was tutor and responsible as such. *Louisiana Code*, 1092.

3. The judge of probates could not change by a different denomination, the responsibilities resulting from the administration of minor's property. The curator should have been named *tutor*. He knew that he was acting for minors, and his acts ought to be considered at least as those of an intermeddler; and had he been appointed tutor, as the law required, or considered an intermeddler, a legal mortgage would have attached to his property, as security for his administration. *Louisiana Code*, 3282–3.

4. Can the minors be deprived of this security, because it pleased the judge of probates to call the administrator *curator of a vacant estate;* and because the person applying for the administration, assumed the same under a different name? the judge and the curator both knew the estate was not vacant. The tutrix for the minors, had no opportunity to oppose the appointment, and it would be unjust to deprive them of their legal recourse on the property of the administrator of their estate, because he chose to apply under a wrong title, and now to have the advantage of his own wrong!

Bowen and *Lewis*, for the administrator, objected to the letter of judge Wilkinson, as testimony, because it was contradicting the written proceedings of the Probate Court, appointing Baker curator of the vacant estate of Sutherland.

2. This is an attempt, by the introduction of parole testimony, to change the character of a curator of a vacant estate, to that of a *tutor*, whose duties and responsibilities are entirely different.

3. The judgment of the Probate Court, appointing Baker *curator* of a vacant estate, cannot be attacked in this collateral way. Parole evidence is inadmissible to contradict or to change its effect.

WESTERN DIST. *Sept.* 1837.

BROWNSON, ADMR., ETC. vs. BAKER'S CREDS.

Carleton, J., delivered the opinion of the court.

The succession of Isaac L. Baker being insolvent, the creditors met, with the exception of the heirs of James Keith, and agreed that the property should be sold, payable at three instalments, in March, 1831, 1832 and 1833. The proceedings were homologated, and the sale took place accordingly.

The heirs of Keith were creditors of the deceased, in virtue of a promissory note, drawn on 1st November, 1825, payable on 1st March, 1826, bearing eight per cent. interest from the date of its execution.

The administrator filed his tableau of distribution, upon which he had calculated the interest on the sum due the heirs of Keith on the note, up to the period only of the death of the deceased. The heirs made opposition thereto, on the ground that they were entitled to interest subsequent to that period. The court overruled the opposition and confirmed the tableau. From this decree the heirs appealed.

The promise to pay interest on a note, enters into the obligation of the contract, and constitutes as much a part of the debt as any portion of the principal sum, and continues to run until payment.

We think the court erred. A promise to pay interest enters into the obligation of the contract, and constitutes as much a part of the debt as any portion of the principal sum; and as long as the debt, or any part of it, remains unpaid, the creditor will have the same right to demand the interest, that he has to claim the debt itself. 3 *Louisiana Reports, page* 159. *Ibid.*, 9, *page* 72 *and* 268.

But defendants' counsel contends, that interest should cease to run from the day each instalment was paid to the administrator, whom he regards as merely the agent of the creditor; and that payment made to the agent is payment to the creditor.

Payment into the hands of an administrator of the proceeds of the property of a succession, will not stop interest until the money is paid over to the creditor.

We do not perceive the force of this reasoning. An agent is appointed by his principal, whose will he obeys. The principal may, if he please, come into the immediate possession of whatever his agent receives. Not so of money paid an administrator. He derives his power from the Court of Probates, whose officer he is, and all payments made by him are under the decree of the court, after a course of judicial proceedings, which are often attended with much litigation and delay.

Another question in the cause has been presented for the decision of this court, at the instance of Jane Webb, tutrix of the minor children of Sutherland.

It appears that Baker had been appointed curator to the estate of Sutherland, as a vacant succession. It is, however, contended, in behalf of the tutrix, that instead of *curator*, he should have been appointed *tutor* to the minor children of the deceased, who were in the state of New-York at the period of their father's death, and that the succession could not therefore be vacant, under the provisions of article 1092 of the Louisiana Code; that if he had been appointed tutor, his estate would have been affected by a mortgage in favor of the minors, which mortgage does not exist upon the property of a curator; that notwithstanding he was not appointed tutor, his responsibility was the same, for having interfered in the administration of the property of the minors. *Louisiana Code, article* 3282–3.

To show that the minors were in New-York at the time of the appointment of the curator, and that the succession was not vacant, reliance is had on the testimony of the probate judge, taken, subject to all legal objections.

The appointment of a curator to a succession as a vacant estate, fixes conclusively the capacity in which he acted, although, in fact, the estate was not vacant, and the minor heirs were known. His responsibilities will be those attaching to the office of curator, and not those of a tutor, who should have been appointed.

Without expressing any opinion upon the point raised in this bill of exceptions, we think that the position taken by the counsel for the tutrix, altogether untenable. The appointment of Baker to the curatorship of the succession as a vacant estate, fixed conclusively the capacity in which he acted, and the responsibilities to which he was liable.

We think the Court of Probates erred in disallowing interest on the note due the heirs of Keith, up to the period of final payment, but correctly overruled the opposition of Jane Webb, tutrix of the minors Sutherland.

It is, therefore, ordered, adjudged and decreed, that the tableau of re-partition filed by the defendants, be so amended as to allow the heirs of Keith interest on said note, of eight per cent. per annum, up to the period of final payment; that the judgment of the court, overruling the opposition of Jane Webb, tutrix of the minors Sutherland, be affirmed; that the

costs accruing in both courts, on the opposition of the heirs of Keith, be paid by the succession of Baker, and those of the opposition of said tutrix, incurred on the appeal, be borne by her.

BROWNSON *vs.* RICHARD.

APPEAL FROM THE COURT OF THE FIFTH JUDICIAL DISTRICT FOR THE PARISH OF ST. MARY, THE JUDGE OF THE SEVENTH PRESIDING.

Where the boundary line between the original proprietors of two contiguous tracts of land has been fixed by judicial decision, and become final, it will have the effect of *res judicata* between the subsequent proprietors, holding under the original ones, respectively.

This suit commenced by injunction, to restrain the defendant from cutting timber on a tract of land, eighteen arpents front by forty in depth, on the bayou Vermilion, and which the plaintiff claims under a title translative of property, and by the prescription of ten, twenty and thirty years' possession.

The plaintiff purchased from one Joseph Latiolais, who previously had a contest for four arpents, with Louis Richard, from whom defendant purchased, upon which their respective boundaries rested, and the land in dispute was decreed to Latiolais, and their boundaries fixed. The plaintiff now claims about two arpents front, running over defendant's line, to a dotted line that figured in a plat made by Garrigues, in the suit of Latiolais.

The defendant set up title to this strip, and which was included in Jackson's plat of survey, returned in this suit, and the boundaries market C D and E F.

The defendant averred, that the boundaries between the two tracts were definitively settled by the suit of Latiolais *vs.* Louis Richard, and which he pleads as *rem judicatem.*

The case was tried before the district judge, on the evidence and documents and plats of survey produced in both suits.

The judge was of opinion, that the defendant's lower line was the same with the upper dotted line in Garrigues's plat, on file in the suit of Latiolais, etc., and established as the boundary therein. Judgment was rendered in favor of the defendant, fixing his lower line as he claims, to the line E F in Jackson's plat. The plaintiff appealed.

Simon, for plaintiff.

Bowen, contra.

Bullard, J., delivered the opinion of the court.

The principal question presented in this case, grows out of the exception of *res judicata* set up by the defendant.

Where the boundary line between the original proprietors of two contiguous tracts of land, has been fixed by judicial decision, and become final, it will have the effect of *res judicata* between the subsequent proprietors, holding under the original ones respectively.

The parties are owners of contiguous tracts of land, the plaintiff holding through Joseph Latiolais, and the defendant through Louis Richard. In a suit between those parties, a boundary line was finally settled by the District Court, and affirmed by this court, which is represented on the plat returned in the case now before the court, by the letters E F on Jackson's plat, corresponding to the dotted line on the plat of survey by Garrigues, in the case of Latiolais *vs.* Richard. The evidence in this case shows, that the defendant has continued to hold according to that judgment, which we are of opinion, precludes the plaintiff from setting up title to any land beyond it, under his purchase. The evidence does not establish the trespass complained of.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

WESTERN DIST.
Sept. 1837.

FOREST
vs.
SHORES.

FOREST *vs.* SHORES.

APPEAL FROM THE COURT OF THE FIFTH JUDICIAL DISTRICT, THE JUDGE OF THE SEVENTH PRESIDING.

The surety cannot maintain an action against his principal, on certain notes executed by them to a third person, which are not due, and have not been paid by him at the time of instituting suit.

Parole evidence is inadmissible to prove that a balance is still due the vendor, when the notarial act of sale, on its face, states that the sale is *made for cash.*

The acknowledgment of payment in a notarial act of sale, is conclusive between the parties, unless contradicted by a counter-letter, or the answer of the party to interrogatories on facts and articles.

This suit commenced by attachment. The petition was filed the 10th August, 1836, in which the plaintiff alleges he is bound as the surety of the defendant, in two promissory notes, for one thousand one hundred and twenty-four dollars, payable the 13th day of August, and the 13th day of September, 1836, to one Philip Hook; that the defendant is also indebted to him in the sum of six hundred and fifty dollars, the balance due on the price of several slaves, although in the notarial act the sale is expressed to be made *for cash;* and that he is indebted in the further sum of fifty dollars for house rent, for which he claims a privilege.

He further alleges, that the defendant has left the state never to return, and prays for an attachment against his property, and after due proceedings had, for judgment for the entire sum claimed.

The attorney appointed to represent the absent debtor, pleaded a general denial, and prayed that the suit be dismissed.

Upon these pleadings and issues the cause was tried before the court.

The evidence showed that the plaintiff was only surety in the notes to Hook, and bound with the defendant, which

were not due at the time of instituting suit. The sale of the slaves, for which a balance of six hundred and fifty dollars is claimed, was made by notarial act, for one thousand five hundred dollars, which expresses on its face to be for *cash* in hand. The plaintiff offered parole evidence, to show that the defendant had acknowledged that there was a balance due, notwithstanding the expression of cash payment in the act. The evidence was objected to, and the objection sustained.

The only witness called, testified that the defendant had left the state, as he believed never to return, and that for the last two months before he went away, he occupied a house belonging to the plaintiff, in the town of Franklin, worth three hundred dollars per annum.

The district judge gave judgment for fifty dollars, rejecting the surety claim, and the balance claimed on the price of the slaves. The plaintiff appealed.

Splane, for the plaintiff, contended, that the surety had a right to institute his suit against the debtor, to secure himself, even before he has paid the debt; and also before the debt is due, when the debtor leaves the state. An attachment will then lie against his property. *Louisiana Code, article* 3026, *first clause.*

2. If the parole evidence had been admitted, it could have been shown, that there was still a balance due on the price of the slaves, although the sale appears to have been made for cash.

3. The plaintiff was entitled to a privilege for the rent due. It is a privileged claim on the property of the debtor.

King, for defendant.

1. When the security *has not paid the debt*, his only remedy against the principal debtor is by an action of indemnity. *Louisiana Code, articles* 3021, 3026.

2. Where the debt or obligation is not yet due, the attaching creditor must swear that the "debtor is about to remove his property out of the state, before the debt

WESTERN DIST. *Sept.* 1837.

FOREST *vs.* SHORES.

becomes due." *Session Acts* 1826, *page* 170. In attachment suits, all the forms prescribed by law must be strictly pursued, otherwise the whole proceeding will be null. 3 *Louisiana Reports*, 18.

3. Between the contracting parties, the authentic act is full proof of the agreement contained in it, and payment acknowledged therein cannot be contested; nor can parole evidence be admitted against or beyond what is contained in an authentic act, by which immovables or slaves are transferred. *Louisiana Code*, 2233, 2234, 2235, 2256.

4. The demand in this case is premature, and the suit must be dismissed, as regards the notes. *Code of Practice*, 158.

Bullard, J., delivered the opinion of the court.

The plaintiff seeks to recover of the defendant, 1st, the amount of several promissory notes in favor of P. Hook, on which he alleges he was surety for defendant, and not due at the inception of this suit; 2d, a further sum, being the balance of the price of three slaves, sold to the defendant; and 3d, fifty dollars for rent. Having recovered a judgment for the last mentioned sum only, the plaintiff appealed.

The surety cannot maintain an action against his principal, on certain notes executed by them to a third person, which are not due, and have not been paid by him at the time of instituting suit.

I. It is neither alleged nor proved, that any part of the notes due to Hook had been paid by the plaintiff, and consequently he has failed to show, that he is entitled to recover the amount from his principal in this action. It is not necessary to inquire whether he be entitled, at this time, to the indemnity, because he has not asked it, but prays for a judgment for the amount of the notes.

Parole evidence is inadmissible to prove that a balance is still due the vendor, when a notarial act of sale, on its face, states that the sale is *made for cash.*

II. To repel his demand for a part of the price of the slaves, the act of sale is produced, in which the plaintiff acknowledges that he had received the whole of the price in hand. Parole evidence was, in our opinion, properly rejected, to prove that in point of fact a balance was still due to the vendor. It is true, the exception of *non numeratâ pecuniâ* was not renounced, but such an exception no longer exists in our law, and the acknowledgment of the payment is conclusive between the parties, unless contradicted by a counter-letter,

The acknowledgment of payment in a notarial act of sale, is conclusive between the par-

or the answers of the party to interrogatories on facts and articles. *Louisiana Code, article* 2234.

III. The plaintiff and appellant complains that the court did not, in giving judgment for the amount of rent due him, accord him a privilege to be paid out of the property attached. The evidence in the case does not enable us to say, whether such a privilege exists in favor of the plaintiff, to secure the payment of his rent on any property attached.

ties, unless contradicted by a counter-letter, or the answer of the party to interrogatories on facts and articles.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

FENNESSY *vs.* GONSOULIN.

APPEAL FROM THE COURT OF THE FIFTH JUDICIAL DISTRICT FOR THE PARISH OF ST. MARTIN, THE JUDGE OF THE SEVENTH PRESIDING.

Where the object of a suit is to avoid a judgment, and the assignment of property under it to the party, as being in fraud of the rights of other creditors of the judgment debtor, it is to be regarded as a revocatory action, by which creditors may cause to be annulled any contract or transaction, so far as they have been injured by it.

Every device, contrivance or machination by which a creditor may have been prejudiced, may form the subject of the revocatory action.

The assignment of property to the wife, in pursuance of a judgment against her husband for her dotal and paraphernal effects, is essentially a contract, *a datien en paiement;* and is like all other contracts, liable to be attacked, as made in fraud of the other creditors of the husband. The action to avoid it is prescribed by one year from the date of the judgment of the attacking creditor.

The mere acknowledgment in a marriage contract of the receipt of money by the husband, is not conclusive against his creditors.

WESTERN DIST. *Sept.* 1837.

FENNESSY *vs.* GONSOULIN.

Where the judgment creditor has a mortgage on the property set over to the wife, in satisfaction of her judgment against her husband for her dotal and paraphernal effects, the mortgage property will be liable in her hands.

This suit is in the nature of an hypothecary action, to enforce a judicial mortgage against certain property in the possession of the defendant.

The plaintiff alleges, that he is the assignee and owner of a certain recorded judgment, obtained by Joseph Fenwick against Adelaide Gonsoulin, and one Sebastian Castigo, for eight hundred and fifty dollars, rendered the 29th April, 1824, and duly recorded and assigned, the 2d day of January, 1826. This judgment was obtained for the price of a house and lot, sold by Pierre Gillé to the said Adelaide Gonsoulin, and Castigo, her surety, which carries with it the vendor's privilege, and operates as a judicial mortgage on all the property of the principal and surety.

The plaintiff further shows, that Adelaide Gonsoulin is now insolvent, and that Castigo intermarried with one Marie Aimée Poussone Gonsoulin, who, desirous of appearing to be worth large property, falsely and fraudulently represented, and had it so stipulated in the marriage contract, that her present property was worth four thousand two hundred dollars, and to consist of a tract of land, four arpents front by thirty in depth, on the bayou Têche, estimated at six hundred dollars; also five hundred dollars in pin money, and two thousand five hundred dollars in a donation from Madame Dubouclet, all of which the said Castigo was made to believe, by the fraud and artifice of the said Marie, would be paid and realized, and accordingly acknowledged the receipt thereof, but none of which was ever paid.

The plaintiff further shows, that some time after the marriage, the said Marie, in order to defraud the creditors of Castigo, falsely and fraudulently commenced a suit for a separation of property from her said husband, claiming as the amount she brought in marriage, the sum of four thousand two hundred dollars; that the said Castigo fraudulently combining with her, made no defence, and judgment was rendered for the entire sum claimed the 24th October, 1824,

which was satisfied by the delivery of property of her said husband, comprising a number of slaves, and the four arpent tract of land which she took back at one hundred dollars.

The plaintiff further shows, that the estate of said Castigo, is exhausted by said judgment, but that he has a judicial mortgage on the property set off to the defendant, in satisfaction of said judgment; and he further says, that he is remediless unless he can have recourse against the said Marie, and the property of Castigo conveyed to her as aforesaid. He therefore, prays, that her judgment be annulled, and that the property assigned to her in satisfaction thereof, be recovered back and made subject to his judicial mortgage, etc.

The defendant pleaded a general denial, and averred, that the marriage contract between her and her husband, was duly registered in the parish of St. Martin, in which her husband resided until his death, and he acknowledges to have received on her account, four thousand two hundred dollars, as stated in said contract; that in January, 1824, she instituted suit and obtained a judgment of separation of property for the restitution of her dotal rights, and that the creditors including the present plaintiff, made opposition and resisted her claim; but that she had judgment in October, 1824, for the sum claimed, and experts or appraisers set off to her the property in satisfaction thereof; that said judgment cannot be disturbed, having been obtained contradictorily with the creditors of her husband. She prays that the plaintiffs demand be rejected, and for general relief.

Upon these pleadings and issues the cause was tried by the court.

On the evidence produced, the district judge rendered judgment for eight hundred and fifty dollars, with interest and costs, and judicial mortgage against Castigo. The judge was further of opinion, that the defendant had no mortgage on the immovables and slaves of her late husband, the declarations contained in the marriage contract not being supported by evidence; that her judgment is fraudulent as respects the plaintiff, and the property set off to her in satisfaction still remains liable to the plaintiff's mortgage, and the

WESTERN DIST. *Sept.* 1837.

FENNESSY *vs.* GONSOULIN.

debts of Castigo's succession. He then annuls the judgment she obtained against her husband, and orders certain slaves which she received in satisfaction of it, to be seized and sold to satisfy the plaintiff's demand. The defendant appealed.

Bowen, for the plaintiff, showed from the evidence, the fraud practised by the defendant against the creditors of Castigo, the surety of the plaintiff's original debtor, and that the judicial mortgage attached to all his property before it passed into the hands of the defendant.

2. He repelled the plea of prescription as not applicable to this case, and cited the *Louisiana Code*, *articles* 1989, 2218, 2418, and 3507.

Caillet and *Simon*, for the defendant.

1. The plaintiff as creditor of the defendant's late husband, seeks to annul a contract of marriage, alleged to have been made in fraud of his rights. This, then, is a revocatory action, which must be brought within one year, either from the date of the contract (when fraud is not the basis of the action) or from the time the creditor has obtained his judgment, if fraud be alleged. *Louisiana Code*, 1982, 1989. 10 *Martin*, 436. 3 *Louisiana Reports*, 29.

2. This cannot be considered as a hypothecary action, for the rules of proceeding, pointed out by law, have not been pursued. See *Code of Practice*, 61, 62, 69 and 70.

3. If the plaintiff had brought his hypothecary action, then the defendant's legal mortgage on the property of her husband, would have had the preference.

4. But in the shape in which the suit is now brought, the defendant's plea, of the prescription of one year, should be allowed to prevail.

Bullard, J., delivered the opinion of the court.

The plaintiff alleges that he is a judgment creditor of Sebastian Castigo, deceased, insolvent; that the present defendant, his wife, had entered with him into a fraudulent combination to place his property beyond the reach of his

creditors, and particularly of any execution which might issue on the judgment in favor of the plaintiff; that under the false pretense of having brought into marriage the sum of four thousand two hundred dollars, partly in her own savings, partly in a sum of six hundred dollars, to be paid shortly after the marriage, and a tract of land, and partly in a donation of two thousand four hundred dollars, from Madam Debouclet, which, he avers, never was paid, although the payment is acknowledged, for fraudulent purposes in the marriage contract, she had recovered a judgment against her said husband for the full amount of four thousand two hundred dollars, which had been satisfied by setting over to her at its appraised value, all the property of her husband; that the tract of land which she had brought into marriage, estimated at six hundred dollars, had been set over to her in part satisfaction of her judgment, estimated only at one hundred dollars. The plaintiff alleges, that this judgment to which he was not a party, is null, and he prays it may be annulled on account of the fraud and collusion between the parties, averring at the same time, that the husband had never received the several sums specified in the marriage contract. The petition concludes with a prayer for a judgment for two thousand dollars damages, and general relief.

In an amended petition the plaintiff further prays, that the defendant's judgment against her husband, and all proceedings thereon, be annulled, or that the land so received by her at one hundred dollars, be decreed to be sold and its proceeds after paying her one hundred dollars, applied to pay the plaintiff's judgment, or that she be adjudged to pay him five hundred dollars, she having, even suppcsing no fraud to have been committed, received that sum over and above what was due her by her husband. This amended petition also concludes with a prayer for general relief.

The defendant denies her liability to pay any debt of her late husband. She alleges, that the plaintiffs had full notice of the claims she had upon her husband by her marriage contract, and that notwithstanding the opposition of the plaintiff and other creditors, she obtained a judgment on the

WESTERN DIST. *Sept.* 1837.

FENNESSY *vs.* GONSOULIN.

24th of October, 1824, against him, and that in pursuance thereof, the parish judge, assisted by two experts, had set over to her, property to the amount of her claim, and that the judgment is conclusive upon the plaintiff. She further pleads the prescription of one year.

The judgment set up by the plaintiff was rendered on the 19th April, 1824, and this suit was instituted on the 19th March, 1827. The property was set over to the defendant, on the 24th of January, 1835, in satisfaction of his judgment.

Where the object of a suit is to avoid a judgment and the assignment of property under it to the party, as being in fraud of the rights of other creditors of the judgment debtor, it is to be regarded as a revocatory action, by which creditors may cause to be annulled any contract or transaction, so far as they have been injured by it.

Every device, contrivance or machination, by which a creditor may have been prejudiced, may form the subject of the revocatory action.

The assignment of property to the wife, in pursuance of a judgment against her husband for her dotal and paraphernal effects, is essentially a contract, *a datien en paiement*, and is like all other contracts, liable to be attacked, as

So far as the object of the present suit is to avoid the judgment recovered by the defendant against her husband, and the assignment of property to her, in pursuance of it, as in fraud of the plaintiff's rights, we can regard it in no other light than as a revocatory action, by which, according to the code, creditors may cause to be annulled any contract or transaction, so far as they may have been injured by it. Every device, contrivance or machination, by which a creditor may have been prejudiced, may form the subject of this action. The assignment made to the wife, of property, though made by the parish judge and experts, in conformity to the judgment, in presence and by the express consent of the parties, must be considered as essentially a contract: *a datien en paiement.* A contract of that description, in consideration of the dotal and paraphernal rights of the wife, is, perhaps, authorized by the code; but, like all other contracts, it is liable to be attacked, as in fraud of other creditors of the husband. The action is, however, prescribed by one year, to run from the date of the judgment which the attacking creditors may have obtained. *Louisiana Code*, 1989.

The evidence does not, in our opinion, authorize a judgment against the defendant, for any thing as personally liable for the debt. But the District Court thought, that as it appeared in evidence that the plaintiff had a judicial mortgage on the slaves transferred to the defendant under her judgment, he was entitled to have them seized and sold, and rendered judgment accordingly, under the prayer for general relief.

No objection was made to the introduction of the evidence, and it is contended that, according to the well settled doctrine of our jurisprudence, parties are to recover according to their proofs. The plaintiff shows a judicial mortgage on the slaves set over to the defendant, and it does not appear to us she has shown a better right. The mere acknowledgment in a marriage contract of the receipt of money by the husband, is not conclusive against his creditors. There is no proof that the two thousand five hundred dollars, alleged to have been given as a marriage portion, ever was paid to the husband, and the tract of land for which she recovered six hundred dollars, remained her property, notwithstanding the estimation in the contract.

made in fraud of the other creditors of the husband. The action to avoid it is prescribed by one year, from the date of the judgment of the attacking creditor.

The mere acknowledgment in a marriage contract of the receipt of money by the husband, is not conclusive against his creditors.

But the District Court went further than merely ordering the slaves to be seized and sold to satisfy the mortgage, and pronounced the nullity of the judgment and transfer. In this respect we think its judgment ought to be reformed. We are bound to consider the defendant as owner of the property set over to her under her judgment, but that the previous mortgage of the plaintiff still subsists on the slaves, and they are liable to be seized and sold to pay the amount.

Where the judgment creditor has a mortgage on the property set over to the wife, in satisfaction of her judgment against her husband for her dotal and paraphernal effects, the mortgage property will be liable in her hands.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be annulled, avoided and reversed; and proceeding to give such judgment as ought to have been rendered below, it is further ordered and decreed, that the slaves Charles, Agatha, and her children Eugene, Zenon and Marie, and also a mulatress named Marie, be seized and sold to satisfy the plaintiff's judgment, to wit: the sum of eight hundred and fifty dollars, with interest, at five per cent., from the 25th of March, 1824, and costs, together with the costs of the District Court, those of the appeal to be paid by the plaintiff and appellee.

WESTERN DIST.
Sept. 1837.

CONRAD ET AL.
vs.
THRUSTON ET AL.

CONRAD ET AL. *vs.* THRUSTON, LEVIN POWELL AND OTHERS, INTERVENORS.

APPEAL FROM THE COURT OF PROBATES FOR THE PARISH OF ST. MARY.

When all the proceedings in the *mortuaria* are closed, the Court of Probates of the parish where the succession was opened, is *functus officio*, and an action of partition among the heirs, may be brought in the parish to which the property of the succession has been removed by the testamentary heirs.

Where heirs at law, of the age of fourteen years, at the time the testamentary heirs took possession of the ancestor's estate, suffer five years to elapse thereafter, before instituting suit claiming part of the inheritance, their claim will be barred by prescription.

This is an action of partition, between the heirs at law and the representatives of the instituted heirs of Charles M. Thruston, deceased.

The facts of this case were drawn up, and agreed to by the counsel on both sides, and are included in the opinion of the court below.

Bowen, for the plaintiffs.

Lewis, contra.

Martin, J., delivered the opinion of the court.

This case is submitted to us on the following statement of facts:

On the 15th March, 1812, Charles M. Thruston, residing in the parish of Orleans, made his last will, by which he bequeathed all his property to his wife, Ann Thruston, *during her life*, and after her death, to his two sons, Alfred Thruston and Edmund Taylor Thruston, except some few particular legacies, and shortly afterwards died there, in the same year. The widow and A. and E. T. Thruston took (or rather kept) possession of his estate, real and personal, and kept it until

the year 1819, when Ann Thruston also died, leaving her two sons, the said Alfred and Edmund T. Thruston, in possession of the said estate, bequeathed as aforesaid.

On the 3d of February, 1821, Alfred Thruston made his will, by which he bequeathed the whole of his estate, real and personal, to his then wife, Elizabeth Thruston, the defendant in this suit, and some few months afterwards died, and she entered into possession.

On the 27th April, 1823, Edmund T. Thruston made his will, which was probated on the 17th July following, he being then dead.

Some time previous to the death of Alfred Thruston, he and Edmund T. Thruston had made a division of part of the property bequeathed to them by the will of Charles M. Thruston, their father, but another part was still owned in common by them, until they both died.

On the 17th October, 1823, eleven years after the death of Charles M. Thruston, this suit was instituted by the tutor of the child and heir of Edmund T. Thruston, against the defendant, testamentary heir of Alfred Thruston, for a partition of the estate bequeathed to them by Charles M. Thruston, and for other matters not now in issue.

On the said 17th October, 1823, David Weeks, a relation of, or friend of the other heirs at law of Charles M. Thruston, filed a petition in the Probate Court, praying that the absent heirs of Charles M. Thruston be represented by an attorney, and accordingly Frederick D. Conrad, Esq., was appointed, and having obtained time to plead, came in, and on behalf of such absent heirs, filed an intervention, claiming to have the will of Charles M. Thruston set aside, and to be permitted to inherit and participate in his succession, as heir at law; and some time afterwards said absentees came in, and made themselves parties to the suit.

Both plaintiffs and defendants in the original action united in opposing to the intervenors, pleas to the jurisdiction of the court, and the prescription of five years, and urged upon the court below, as they now urge, that their claim against said will is barred by said prescription. It was agreed below,

WESTERN DIST. *Sept.* 1837.

CONRAD ET AL. *vs.* THRUSTON ET AL.

that the rights of the intervenors to come into this suit, to have any of said estate, or whether they are or are not barred by prescription, should be first tried, leaving all the questions between the original parties open.

And on the trial of these matters, the judge below was of opinion, that the intervenors' rights were barred by prescription, and gave judgment against them, from which judgment this appeal is taken.

It is also a fact, that all the absent heirs have always resided out of the state of Louisiana, and that Levin Powell came of age in April, 1824, and represents as only child of Sidney Thruston, who was one of nine children by the second marriage of Charles M. Thruston.

The counsel for the appellees, the original parties, contends, that the judgment of the Court of Probates ought to be affirmed, and the case remanded, because the Probate Court of the parish of St. Mary has no jurisdiction, as the succession of C. M. Thruston, claimed by the intervenors, was opened in the parish of New-Orleans.

When all the proceedings in the *mortuaria* are closed, the Court of Probates of the parish where the succession was opened, is *fuctus officio*, and an action of partition among the heirs may be brought in the parish to which the property of the succession has been removed by the testamentary heirs.

The counsel further urges, that the plea of prescription was correctly allowed, because the heirs of C. M. Thruston were suffered to take and keep possession of his estate, under his will, for more than eleven years before complaining. *Partida* 6, *title* 8, *law* 4. 7 *Martin*, 402.

It appears to us, that the plea to the jurisdiction was correctly overruled. All the proceedings in the *mortuaria* of Charles M. Thruston, whose succession was opened in the parish of New-Orleans, were closed, whereby the court became *functii officio:* the property of the estate, which is now claimed by the intervenors and appellants, having been received by the testamentary heirs, and by them removed to the parish of St. Mary.

Where heirs at law, at the age of fourteen years, at the time the testamentary heir took possession of the ancestor's estate, suffer five years to elapse thereafter, before instituting suit, claiming a part of the inheritance, their claim will be barred by prescription.

We think that the plea of prescription, as to the intervenors, except Levin Powell, who were upwards of fourteen years of age at the time the testamentary heirs took possession of the estate, was properly sustained. It is otherwise as to Levin Powell, who was born in 1803, and was not ten years of age at that time.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Court of Probates, so far as it relates to the intervenors, with the exception of Levin Powell, be affirmed, with costs, and that, so far as it concerns said Powell, it be annulled, avoided and reversed; that the plea of prescription opposed to him by the original parties be overruled, and that the case be remanded for further proceedings according to law, between the plaintiffs, defendants and him, the appellees paying the costs of the appeal in this respect.

THEALL *vs.* THEALL'S LEGATEES.

APPEAL FROM THE COURT OF PROBATES FOR THE PARISH OF ST. MARY.

When dispositions *mortis causâ*, exceed the disposable portion, the forced heir can claim his *legitime*, and the deduction necessary to make it up, shall be made *pro rata*, without any distinction between universal and particular legacies.

So where the testator bequeathed his estate, one half to his wife and the other to his brother's children, except a few particular legacies, but leaving a mother as a legatee of particular objects, she is still entitled to her *legitime* of one fourth, and the universal and particular legacies are required to be reduced *pro rata* to make up her legitimate portion.

Where the mother received a legacy of particular objects which belonged to the community between the testator and his wife, she will be bound to account to the widow for one half of their value.

This case commenced by an action of partition between the widow and other legatees of the late Joseph Theall, of the parish of St. Mary. See the case in 7 *Louisiana Reports*, 226.

On the return of the case from the Supreme Court, in 1834, the mother of Joseph Theall, the testator, intervened and claimed her *legitime* of one fourth of all the property of

WESTERN DIST. *Sept.* 1837.

THEALL *vs.* THEALL'S LEGATEES.

her deceased son, as forced heir. She had been allowed a legacy of several specific objects in the will.

The widow of the testator opposed her claim, on the ground, that she had accepted and received a legacy under the will, and is presumed to be divested of her *legitime* by the acceptance of the legacy.

The widow and plaintiff in this case further opposed the intervenors claim, and demanded that if it should be allowed, she be required to renounce her legacy and all the benefits under the will, and that she be ordered to make her election which she will choose, the legacy or the *legitime;* that she cannot have both, the two being inconsistent with each other.

Upon these pleadings and facts the case was tried. The judge of probates proceeded to allot each legatee his portion. Judgment was rendered decreeing the *legitime* to the intervenor and forced heir, as she claimed, and without requiring her to renounce her legacy under the will.

The plaintiff (widow Theall) appealed.

Lewis, for the plaintiff, insisted, that the mother of the testator could not receive her legacy and be entitled to her *legitime*. She must renounce the one if she takes the other.

2. The deduction must be made from all the legacies *pro rata*, if the *legitime* is allowed. The forced heir must contribute from her legacy. *Louisiana Code*, 1498. See also *articles* 1627, 1628.

Simon, for the intervenor.

The intervenor in this case, is the forced heir of Joseph Theall, the testator, and is not only entitled to the legacy in the will, by law, but also to her *legitime* or portion, as forced heir of her son. It would, perhaps, be different, if she inherited in concurrence with other forced heirs; but as to strangers, whose rights as legatees are derived entirely from the will, they cannot deprive her of her *legitime*, nor require her to renounce her legacy. 6 *Toullier*, *No.* 165. 10 *Ibid.*, *No.* 186. 10 *Dalloz*, *page* 366. 10 *Sirey* 2, *pages* 7 and 8.

2. The legacy made to the intervenor is not subject to reduction, for it is a particular legacy of certain specific objects, and in supposing that the effects of the succession would not suffice to discharge the particular legacies, after satisfying the *legitime*, the loss is to fall upon the legatees of particular sums of money. *Louisiana Code, article* 1627, 1628.

Bullard, J., delivered the opinion of the court.

The mother and forced heir of Joseph Theall, who had received a particular legacy under his will, intervened in the case pending in the Probate Court, for a final partition and settlement of his estate, and claimed one fourth of the property of the testator as her *legitime*. Her right is denied by the widow who is one of the residuary legatees, but she further contends, that even if the intervenor is entitled to one fourth of the estate, she is bound to renounce her specific legacy and restore the same to the mass.

The widow is appellant from a judgment which allowed the forced heir her *legitime*, without any deduction from the legacy she had received.

That part of the Louisiana Code which treats of the reduction of dispositions, and the manner in which it is to be done, establishes the general principle, that "when the dispositions *mortis causâ* exceed either the disposable quantum, or the portion of that quantum after the deduction of the value of donations *inter vivos*, the deduction shall be made *pro rata*, without any distinction between universal dispositions and particular ones." *Louisiana Code, article* 1498.

This article of the Code appears applicable to the case under consideration. A forced heir demands a reduction of donations *mortis causa*, in order to make up to her that portion which the testator could not validly dispose of, and the will contains both kinds of disposition.

The article 1628 of the Louisiana Code, on which the counsel for the appellee relies, provides, it is true, that "if the effects do not suffice to discharge the particular legacies, those of particular *objects* must first be taken out, and the surplus be proportionally divided among the legatees of sums

When dispositions *mortis causâ*, exceed the disposable portion, the forced heirs can claim their *legitime*, and the deduction necessary to make it up shall be made *pro rata*, without any distinction between universal and particular legacies.

So, where the testator bequeathed his estate, one half to his wife, and the other half to his brother's children, except a few particular legacies, but leaving a mother, as a legatee of particular objects, she is still entitled to her *legitime* of one-fourth, and the universal and particular legacies are required to be reduced *pro rata* to make up her legitimate portion.

WESTERN DIST. *Sept.* 1837.

BAKER *vs.* TOWLES'S ADMX. ET AL.

Where the mother received a legacy of particular objects, which belonged to the community between the testator and his wife, she will be bound to account to the widow for one half of their value.

of money." But the article immediately preceding (1627) appears to recognize the same principle of reduction for the benefit of forced heirs. It declares that "particular legacies must be discharged in preference to all others, even though they may exhaust the whole succession, or all that remains after the payment of the debts, and the *contribution for the legitimate portion in case there are forced heirs.*"

It appears that the objects bequeathed to the forced heir belonged to the community, and we are of opinion she is bound to account to the widow for one half of their value.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Court of Probates be reversed, and it is further ordered, that the case be remanded with directions to the Probate Court to proceed to the partition and settlement of the succession, and the deductions in order to make up the *legitime* of the forced heir, according to the principles stated in this decree, and that the appellee pay the costs of this appeal.

BAKER *vs.* TOWLES'S ADMINISTRATRIX ET AL.

APPEAL FROM THE COURT OF THE FIFTH JUDICIAL DISTRICT, FOR THE PARISH OF ST. MARY, THE JUDGE OF THE SEVENTH PRESIDING.

The sheriff's deed as collector of taxes, without evidence of any assessment of the taxes, is defective in form, as it does not show the warrant of the collector to sell, and is not translative of property, which will form the basis of the ten years' prescription.

But where the sheriff's deed is supported by the assessment roll, showing the taxes were duly assessed for the year the sale was made, and proper notices given of the sale, the purchaser will acquire a good title, which will support the prescription of ten years.

Testimonial proof is admissible to show that advertisements of sales were inserted in newspapers; and also that they were posted up at the usual public places required by law.

Sheriff's deeds of sales of property for taxes, are not required to be recorded, to have effect against third persons, by the provisions of the registry acts of 1810 and 1813, or by the Civil Code of 1808.

Having a title, the cutting of wood, which without one would amount to a trespass, must be regarded as an act of ownership and possession.

This is an action of partition, in which the plaintiff sets up title to the greater part of a tract of land, in the possession, and claimed by the defendant, as administratrix of the estate of her deceased husband, Dr. John Towles.

The plaintiff alleges that he is the owner of thirty-three and three-fourth arpents of land, being part of a tract of sixty arpents front by forty in depth, on the east side of the bayou Têche, below the town of Franklin, in the parish of St. Mary, which was originally conceded to the widow D'Arby, and confirmed to her heirs and grantees.

He further shows, that he purchased at different times from the heirs and grantees of the widow D'Arby, the quantity of this land which he now claims, and states that the late Dr. John Towles purchased fifteen arpents of the remainder of this tract from B. C. Crow, whose vendor bought from Ursin D'Arby, a son and heir of the original grantee, and the balance from others, so that Towles's estate is now the owner of the remaining twenty-six and one-fourth arpents, in common with him. He prays that a partition be made between them.

The administratrix of Dr. Towles's estate denied that the plaintiff had any right or title whatever to any part of the tract of land sought to be partitioned; that the entire tract belonged to the succession of Dr. Towles, who in his life time purchased fifty arpents of the same, at a sale made by the sheriff of St. Mary, for the taxes assessed in 1816, in the name of the heirs of widow D'Arby, and that he acquired the remainder by other good and sufficient titles.

The defendant further avers, that Dr. Towles, in his life time, and his heirs and legal representatives since his death, have possessed the said tract of sixty arpents, under good and valid titles, for more than ten years previous to the institution of this suit. She pleads the prescription of ten years, and prays that the plaintiff's demand be rejected, and his suit dismissed.

Upon these pleadings and issues, with the particular titles set up by the plaintiff, the cause proceeded to trial.

The principal contest arose on the validity of the sale of fifty arpents of the land in question, for the taxes of 1816, and the defendant's title under it. This sale was made by the sheriff of the parish of St. Mary, after giving notice in the usual form, by posting up written notices of the sale at the court house. The sheriff was still living, and his testimony taken as to the manner of making the sale. The assessment roll was also produced in evidence, showing the assessment of this land for the taxes of 1816, in the name of the heirs of widow D'Arby, the original grantee. The sheriff's deed recited the objects of the sale, and that the formalities of the law were complied with. It is dated the 10th July, 1817, but was never recorded. Dr. Towles, the purchaser, had taken possession, and continued to exercise acts of ownership on this land, by cutting timber and making a small improvement, from the time of his purchase in 1817.

The district judge was of opinion, that the plaintiff made out a good and complete title to thirty-three and three-fourth arpents, and that the defendant's late husband derived no valid title under the sale for taxes, but that his estate has shown title to twenty-six and one-fourth arpents, derived from Ursin D'Arby, and another of the heirs of widow D'Arby, the original grantee. Judgment was rendered accordingly, from which the defendant appealed.

Simon, for the plaintiff.

Conrad, for the defendant, contended, that Towles's estate showed a complete legal title to the whole of the land in controversy: to the first fifty arpents, under the sale for the

taxes, made in 1817, and to the remainder by the purchase from Crow in 1819, of fifteen arpents. The sale for taxes conveyed a perfect title, because the assessment roll, and every thing necessary to constitute a perfect title, has been shown. 6 *Martin, N. S.*, 347. 7 *Louisiana Reports*, 49. 8 *Ibid.*, 198. 10 *Ibid.*, 276.

2. Even if the notices of sale had not been proven, the sheriff's return shows that the sale was made according to law, and the court will presume that he done his duty. 3 *Louisiana Reports*, 476. 6 *Ibid.*, 628. 8 *Ibid*, 422.

3. The *maxim omnia recta acta* applies with greater force and equity to the acts of sheriffs and other public officers, after the great lapse of time which has occurred in this case, than to any others. 3 *Starkie on Evidence*, 1223–4–5–6–8. *Phillips*, 119 *to* 124. *See note to page* 124, *on Decision in relation to Sales for Taxes in Massachusetts.*

4. But the defendant in this case has no need to invoke the aid of this maxim. The evidence of the sheriff who made the sale is taken, and proves conclusively that the legal notices of sale were given. His evidence is admissible, and establishes the legality of the sale. The purchaser is not responsible for any subsequent informalities. 5 *Louisiana Reports*, 516. 5 *Martin*, 698. 4 *Martin, N. S.*, 460.

5. It was not necessary to record this sale, to have effect against third persons. By the act of 1813, which is the only law on the subject, sales made by the sheriff under execution only, are to be recorded; it is silent as to collector's sales. Under the laws of 1813–14, a sale for taxes by a collector, was neither a sale by the *sheriff*, nor a sale *under execution*, but a sale for taxes by a collector, *under an assessment roll. Livingston* vs. *Walden*, 4 *Martin, N. S.*, 458.

6. But even supposing it was necessary this sale should be recorded to be binding on third persons, it being perfect in point of form, is sufficient to form the basis of the ten years' prescription, which completed before suit, will confer a title in the purchaser against all the world.

7. The defendant's husband acquired title to the remaining fifteen arpents of land, from one of the heirs of the widow

WESTERN DIST. *Sept.* 1837.

BAKER VS. TOWLES'S ADMX. ET AL.

D'Arby, in 1817, which is admitted by the plaintiff. Thus the title of Towles's estate to sixty-five arpents front, is shown to be complete, *first*, by the sale of fifty arpents for the taxes; *second*, by prescription under this sale; and *third*, by purchase of fifteen arpents from D'Arby's heirs.

Lewis, on the same side, insisted, that the sheriff's sale for taxes was made in due form of law, and conferred a good and valid title on the purchaser, without even recording it. The production of the assessment roll showed the authority of the sheriff to sell, as the collector of the taxes assessed on this land, in 1816. The testimony of the sheriff, after the lapse of near twenty years, proves that proper and legal notices were given of the sale, and that the formalities of law were complied with. Parole testimony is admissible to prove the notices were given according to law. 6 *Martin, N. S.*, 365, *et seq.* 7 *Ibid.*, 185. 7 *La. Reports*, 49. 10 *Ibid.*, 282.

2. This sale is sufficient, as the basis of the prescription of ten years. The defendant's husband was in possession from the time of the purchase, and for more than ten years before this suit.

3. Even if the sheriff's deed is to be considered as a private act, being accompanied by possession, it need not be recorded, to have effect against third persons.

4. If the defendant's title prevails, as it ought to do, both on its merits and by prescription, it is unnecessary to inquire into the validity of the plaintiff's titles. It cuts off the whole of them.

Bullard, J., delivered the opinion of the court.

This is an action of partition. The object to be partaken is a tract of land, of sixty arpents front, originally granted to the widow D'Arby.

The defendant contests the title of the plaintiff to any part of the tract under his conveyances from some of the heirs of the grantee, and from the heirs of Delahoussaye, who pretend to have acquired a right to one-fourth, under the confirmation of one half the tract, by act of congress. She asserts title

in the estate of Towles to the whole tract, partly by a sale from one of the heirs to Brashear, from the latter to Crow, and from Crow to John Towles, whose estate she administers, which is not contested; but principally in virtue of a sale for taxes, in 1817, of fifty arpents front, by the sheriff of the parish of St. Mary, at which Towles became the purchaser. She further pleads the prescription of ten years.

The defendant gave, in evidence, a deed signed by the sheriff of the parish of St. Mary, and *ex-officio* collector of the state taxes, from which it appears, that the fifty arpents of land in controversy, were seized for the tax of 1816, due by the heirs of D'Arby, who were non-residents, and sold according to law, and that John Towles became the purchaser.

In support of this deed the tax rolls for the year 1816, are produced, from which it appears, that the tax for which the land was sold, had been assessed, and was due by the heirs of D'Arby.

The former sheriff of St. Mary, by whom the sale was made, was examined as a witness. He states in general terms, that he is certain this sale was made after the advertisements and notices required by law, at that time. On his cross examination, he says, it is hard to recollect now the particular mode, but is persuaded that he advertised according to law. There was no newspaper printed in the parish that year. Manuscript notices were posted up in both languages at the customary places; he recollects perfectly to have done it.

It is shown that the heirs of D'Arby resided in the adjoining parish, and this suit was instituted in 1835. During all that time, except one year, the land was assessed as the property of Towles, and he paid the taxes, and that he exercised different acts of ownership.

The sheriff's deed as collector of taxes, without evidence of any assessment of the taxes, is defective in form, as it does not show the warrant of the collector to sell, and is not translative of property, which will form the basis of the ten years' prescription.

In the case of Reeves *vs.* Towles, decided last September, 10 Louisiana Reports, 276, we held that a collector's deed, without evidence of any assessment of the tax, was defective in form, as it did not show the warrant of the collectors to sell, and consequently not translative of property, and could not form the basis of the ten years' prescription. If the con-

WESTERN DIST. *Sept.* 1837.

BAKER *vs.* TOWLES'S ADMX. ET AL.

verse of that proposition be true, little more would remain but to inquire into the character of the defendant's possession under the deed for nearly twenty years.

But where the sheriff's deed is supported by the assessment roll, showing the taxes were duly assessed for the year the sale was made, and proper notices given of the sale, the purchaser will acquire a good title, which will support the prescription of ten years.

But, it is contended, that the evidence is insufficient to show, that strict compliance with the law in relation to notices and advertisements, which this court has held to be essential to make out a valid title, under a sale for taxes in the cases reported in 4 *Louisiana Reports*, 150, 207.

Parties who lay by for so long a period of time, without asserting their claim; who suffer the circumstances which accompanied a transaction to fade from the memory of the vicinage, and even of those officially concerned in it, ought not to complain that less rigid evidence is admitted, nor ought they to gain by their own acquiescence while the transaction was yet recent, and when perhaps more complete evidence might have been obtained. In the present case it is not a little remarkable, that the collector was still alive at the trial of this case, and that from an original entry made at the time, he should remember enough of the matter to assert positively, that written advertisements were posted up in both languages, at the customary places, without being so minute as to render his testimony suspicious. We have recently held, that testimonial proof is inadmissible to show advertisements in newspapers. These advertisements posted up in public places, are seldom, we believe, preserved, and if they were they would not prove *per se*, that they had been posted up in the usual places, and for any particular length of time.

Testimonial proof is admissible to show that advertisements of sales were inserted in newspapers, and also that they were posted up at the usual public places required by law.

But the plaintiff contends, that the sheriff's deed can have no effect against him, because it was not recorded until after the institution of this suit, and that the act of 1813, as well as that of 1810, and the Civil Code of 1808, required, that such deeds should be recorded, in order to give them effect against third persons.

Sheriffs' deeds of sales of property for taxes, are not required to be recorded, to have effect against third persons, by the provisions of the registry acts of 1810 and 1813, or by the *Civil Code* of 1808.

It does not appear to us that either of the provisions relied on, embraces deeds of this kind. The act of 1813, speaks of sheriff's sales made under execution, and although in some respects there is some analogy between the two

cases, yet the tax roll which is the warrant of the collectors to coerce the collection of taxes, is certainly not an execution, nor can the sale be said to be by the sheriff in that capacity. His sureties as sheriff are not responsible for his acts as collector. He gives a distinct bond.

The evidence clearly shows, that possession followed the deed, and that Dr. Towles continued to possess up to the time of his death. He cut wood and timber on the place habitually, and at one time had a small enclosure which was used as a garden. Having a title, the cutting of wood, which, without one, would amount only to a trespass, must be regarded as an act of ownership and possession.

Having a title, the cutting of wood, which, without one, would amount to a tresspass, must be regarded as an act of ownership and possession.

Being of opinion that the defendant has established a title in the estate to the whole tract, it is unnecessary to examine several other questions raised in the argument.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be reversed and annulled, and that ours be for the defendant, with costs, in both courts.

SEGUR ET AL. *vs.* SOREL ET UX.

APPEAL FROM THE PROBATE COURT FOR THE PARISH OF ST. MARY.

A sequestration may be ordered when the plaintiff sues for a *partition* of movable property, either in kind or by licitation, if he swears he *verily believes* the defendant will send the property out of the jurisdiction of the court.

The perishable nature of property furnishes no reason why it should not be sequestered. It may then be sold, and the proceeds deposited in court.

A sequestration should not be set aside, because the petition did not set forth the place of residence of the defendant. Such a defect of mere form, may by cured by amendment *instanter*.

WESTERN DIST. *Sept.* 1837.

SEGUR ET AL. *vs.* SOREL ET UX.

When a partition in kind is shown to be impracticable, the probate judge may change his judgment, and order a sale, without even the formality of a new petition.

A tutor's authority to sue, and provoke a partition of the property coming to his pupil, is sufficiently shown, by exhibiting the order of a family meeting to that effect, and its homologation by the judge.

This is an action of partition, and for the sequestration of a crop of sugar, in the possession of the defendants.

The plaintiff, as the tutor of the minor son of the late Frederick Pellerin, brought this suit to sequester and divide the crop of sugar made on the paternal estate, in the year 1836, and also for the division of the proceeds of the previous crop, which he alleges, amounts to about twenty thousand dollars. The defendant, Martial Sorel, is married to the daughter, and only remaining heir of said Pellerin.

The plaintiff further states, that the Probate Court for the parish of St. Mary, in November, 1836, ordered a partition of the said estate to be made in kind between these parties, but which cannot be executed, and that a sale is necessary.

He prays, that the crop of last year, yet on hand, be sequestered; that the judgment aforementioned be set aside, so far as it determines the manner of making the said partition; that an inventory be made, and the property of said estate be sold at public auction, in order to effect a final partition of the proceeds, and that he be put in possession of one-half thereof, as the share of his pupil; and that the defendants be ordered to account and pay over one-half of the sugar crop sold by them, to wit: the sum of ten thousand dollars. At the foot of the petition, he swears he *verily believes* the defendant will remove the sugar crop on hand out of the jurisdiction of the court, and prays for a writ of sequestration.

The defendant's counsel moved to set aside the writ of sequestration, on several grounds set forth. He then excepted to answering the petition for certain reasons.

On the merits, the defendants plead a general denial, and denied specially the plaintiff's authority to sue as tutor, etc., as he had never been legally appointed.

They state they never had any objection to a legal partition, and that all they desire is a definitive partition, according to law; but that it would be more advantageous to let the property and estate remain as it is now, in partnership between the two heirs.

They state further, that the sugar sequestered is undivided, and one-half belongs to them, and must all be sold before division, and that they have done nothing but what they were authorized to do, as *negotiorum gestores*, and that they are able and ready to account.

They pray that the plaintiff's demand be rejected; but if this be refused, that a partition be made in the most beneficial manner, and according to law.

There was judgment sustaining the plaintiff's demand for a partition, but dismissing the sequestration. The defendants appealed.

W. B. Lewis, for the plaintiff.

1. The sequestration was properly issued, and ought not to have been set aside. *Code of Practice, articles* 269, 273, 274 *and* 275, *No.* 2.

2. The oath of plaintiff to obtain the sequestration is sufficient, the words "*verily believes*" being equivalent to "*fears*" and even stronger. *Code of Practice, article* 275, *No.* 2, *and* 276.

3. It was not necessary to give a bond to the wife of Sorel, as the sequestration was only made necessary by the acts of Sorel himself, who had actual possession of the sugar sequestered. *Code of Practice, loco citato.*

4. The want of setting out the domicil of defendants, was cured by the amended petition, which was properly allowed by the probate judge. *Code of Practice*, 491, 421. 2 *Martin, N. S.*, 625. 4 *Louisiana Reports*, 298.

5. This is neither an action of partition nor of nullity, properly so called, but only a contestation that arose before the notary, when attempting to make a partition that had already been legally decreed between the parties, and which might have been referred to the judge of probates by a

WESTERN DIST. *Sept.* 1837.

SEGUR ET AL. *vs.* SOREL ET UX.

simple motion, *a fortiori*, it could be properly done by petition. *Louisiana Code, articles* 1290, 1258 *and* 1250.

6. Plaintiff was duly authorized to institute the suit for a partition, and that authorization necessarily carried with it power to prosecute all other proceedings necessary to effect that object; and no such authorization is necessary in any case, except to sue for a partition. *Louisiana Code*, 1235. *Code of Practice*, 108, 109.

7. Lament Segur was legally appointed tutor, having paid the debt he owed the minor before the homologation of the recommendation of the family council to the under tutor, who was the proper person to receive it, there being yet no tutor. *Louisiana Code*, 322, *No.* 8, *also article* 301.

Simon, contra.

T. H. Lewis, for the plaintiff, in reply.

1. The tutor was bound to take an oath, and give bond and security *before* his letters of tutorship could be delivered to him, and the delivery of such letters constitute the appointment; and the tutor is *appointed by the judge*, not by the family council. *Louisiana Code*, 289, 332, 328.

2. Defendants having suffered a final judgment, decreeing a partition of the estates of F. Pellerin and wife, cannot now, on this collateral issue, dispute plaintiff's right to represent the minor Pellerin, as his tutor. That matter has already been decided, and forms *res judicata* against defendants.

Bullard, J., delivered the opinion of the court.

The plaintiff as tutor of C. F. Pellerin, having obtained a judgment against his co-heirs, the defendant and his wife, for the partition of the succession of their father and mother, to be made in kind, and it appearing afterwards by the report of experts, that the partition could not be effected without a sale or licitation, applied by petition to the Court of Probates, reciting the preliminary judgment, and the impossibility of coming to a partition in nature, and praying a modification of the order, and that the same should be made by sale. He

further represents, that since the inception of the suit, a crop of sugar has been made on the inception belonging to those successions amounting to two hundred hogsheads, of which one-half belongs to his pupil, and that Martial Sorel, had, the year previously, sold a crop, amounting also to about two hundred hogsheads, for twenty thousand dollars, of which, one half belongs to his pupil. He prays the sequestration of the crop on hand, and that the whole may be sold in order to come to a partition, and that the defendant account for one-half of the crop of the preceding year, with interest. At the foot of the petition, the tutor made oath, that he *verily believes* that Mr. Sorel will send out of the jurisdiction of the court, all the portion of sugar belonging to C. F. Pellerin. Therefore, a writ of sequestration was ordered.

The defendant filed a written motion to set aside the sequestration, on various grounds.

1st. That the writ was irregularly and illegally obtained and issued, and not on any ground pointed out by the laws of the state.

2d. That the oath taken by the plaintiff is insufficient.

3d. Because neither the oath nor the bond, specifies sufficiently, the property to be sequestered, not showing the number of hogsheads.

4th. Because the bond is made in favor of only one of the defendants, but in favor of Sorel, who appears, in this suit, only to assist his wife, who is one of the part owners.

5th. Because the plaintiff had no right to sequester the whole crop, as one-half belongs to his wife.

6th. Because the objects sequestered are perishable, and are daily diminishing in value.

7th. Because the plaintiff has no right to claim the ownership of said crop, either as tutor or otherwise, before satisfying, or paying, or at least offering to pay, all the expenses incurred in making the same, which claims are privileged and due to the defendants.

8th. Because the whole crop belongs to the defendants.

WESTERN DIST. *Sept.* 1837.

SEGUR ET AL. *vs.* SOREL ET UX.

9th. Because generally all the proceedings had, in obtaining the sequestration, were illegal, irregular and void.

I. We are of opinion, that this is one of the cases in which a sequestration may be allowed, as a conservatory measure, according to the article 275 of the Code of Practice.

A sequestration may be ordered when the plaintiff sues for a *partition* of movable property, either in kind or by licitation, if he swears he *verily believes* the defendant will send the property out of the jurisdiction of the court.

II. The code requires the party to swear that he *fears* the party in possession of movable property, in dispute, will send it out of the jurisdiction of the court. In this case he makes oath that he *verily believes* it. This appears to us even stronger than swearing to his fear or apprehension of some removal, and necessarily implies that the party apprehends it.

III. The amount of the crop was described to be about two hundred hogsheads, and this, in our opinion, was as explicit as could be expected, or ought to be required when the whole was exclusively under the control of the defendants.

IV. The bond is made in favor of the person, who, it is alleged, is about to remove the sugar, and is, in our opinion, sufficient.

V. It was manifestly impossible to sequester one undivided half of the crop. The plaintiff's pupil was entitled to one half of every hogshead.

The perishable nature of property furnishes no reason why it should not be sequestered. It may then be sold and the proceeds deposited in court.

VI. The perishable nature of the object may be a good reason for having the whole sold and the proceeds deposited in court, but furnishes none why it should not be kept within the jurisdiction of the court.

VII. This ground has not been urged in argument, and is, in our opinion, wholly untenable, and the next is equally undeserving our attention, because it is contradicted by all the evidence in the case, and the admissions of the defendant himself.

On the last general ground, the court below, upon the authority of this court, in the case of *Leavenworth* vs. *Plunket*, 7 *Louisiana Reports*, 341, set aside the sequestration.

A sequestration should not be set aside because the petition did not set forth the place of resi-

This court in that case, said, that the petition for a sequestration was not an amendment to the original petition ; that it was in a manner wholly unconnected with it, setting up matter which had arisen posterior to the petition. But we

cannot assent to the conclusion to which the judge of probates come, that the sequestration ought to have been set aside, because the petition did not set forth the place of residence of the defendants. Such a defect of mere form, might, in our opinion, have been cured by amendment instanter; but the code authorizes a writ of sequestration to issue, pending a suit at the request of one of the parties. The parties appear to us to have been before the court in the original proceeding, in which a partition had already been ordered, and this conservatory measure is to be considered an incident to that case.

dence of the defendant. Such a defect of mere form, may be cured by amendment *instanter*.

The matter had been referred to a notary to carry on the operation, but the suit was still pending, and the judge might decide upon questions arising in the further progress of the partition, in a summary manner. We think the judge erred in quashing the sequestration.

The defendant at the same time filed certain exceptions to the petition, and the form of action which we proceed to notice. 1st. That the petition does not state the residence or domicil of the defendants, nor in what parish the successions in question were opened. 2d. Because the petition being intended for an action of partition, does not state in any manner what property belongs to said successions, nor state what kind of property he seeks to partition. 3d. Because the present suit which appears to be one of partition, is also intended as an action of nullity against a judgment previously rendered, and the petition does not state any legal grounds of nullity. 4th. Because such actions are entirely distinct, and cannot be cumulated. 5th. Because the plaintiff has not been legally and duly authorized to bring the present suit. 6th. Because the present suit has none of the requisites of an action of partition.

In relation to the 1st and 2d exceptions, which regard the insufficiency of the petition, we have already said that such defects might be cured by an immediate amendment, to which no new answer would be necessary, because no new grounds or facts would be disclosed; accordingly an amendment was allowed.

WESTERN DIST. *Sept.* 1837.

SEGUR ET AL. *vs.* SOREL ET UX.

When a partition in kind is shown to be impracticable, the probate judge may change his judgment, and order a sale, without even the formality of a new petition.

3d and 4th. We cannot regard this as, in any sense of the word, an action to annul a previous judgment rendered between the parties in the same court. That judgment merely condemned the defendants to come to a division of property, which they held in common with the pupil of the plaintiff. It is true, it ordered the partition in kind, but we think that judgment does not prevent a different form of partition, if it be found impracticable to divide the property in nature. When in the progress of the notary, it was found by the report of experts, that a partition could not be effected in the manner first required by the parties, and ordered by the court, it became necessary for the court to decide upon the question, and it might have done so without the formality of a new petition. When either party requires a partition in kind, the judge cannot order a sale or licitation, until its necessity has been shown to his satisfaction. *La. Code*, 1259, 1260–61.

5th. The capacity and authorization of the plaintiff to institute this suit, is next contested, and it has been urged in argument, that the plaintiff was a debtor of the minor at the time of his appointment, and that he did not take the oath required by law, after his disability had been removed by the payment of the debt.

A tutor's authority to sue, and provoke a partition of the property coming to his pupil, is sufficiently shown by exhibiting the order of a family meeting to that effect, and its homologation by the judge.

Considering as we do, that this proceeding is nothing more than an incident to the original action of partition, and that according to the defendants' own allegation a final judgment has been pronounced, it appears to us, it is too late for him to contest the capacity of the plaintiff to sue. His authority, in our opinion, is sufficiently shown, by exhibiting the advice of a family meeting to that effect, and the homologation of it by the judge.

We concur in opinion with the judge of probates, that the judgment ordering a partition is merely preliminary, and the case is still open before the court, as to all questions which may arise in relation to the mutual claims of the parties, and collating, until the partition itself has been finally terminated. *Utile per in utile non vitiatur.* If one of the parties interested,

might have brought before the judge for decision, by simple motion, any question connected with the partition, *a fortiori* may be by petition.

The court did not, in our opinion, err, in ordering a sale for the purpose of effecting a partition; but the judgment must be reformed in regard to the sequestration.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Probate Court be affirmed, with costs; but that the sequestration be reinstated, and the case remanded for further proceedings, according to law.